RECORD, CASE No. 14,

SUPREME COURT OF THE UNITED ST

OCTOBER TERM, 190

TERM No., 810.

SARAH R. ANGLE, ADMINISTRATRIX OF THE
OF HORATIO G. ANGLE, DECEASED, APPELL

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND O
RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STAT
THE WESTERN DISTRICT OF WISCONSIN.

FILED FEBRUARY 17, 190

RECORD, CASE No. 13,968.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 310.

SARAH R. ANGLE, ADMINISTRATRIX OF THE ESTATE OF HORATIO G. ANGLE, DECEASED, APPELLANT,

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

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Exhibit A—List of lands granted to the State of Wisconsin by acts of Congress of June 3d, 1856, and May 5th, 1864, and granted by said State to the Chicago and Lake Superior Air Line Railway Company (now Chicago, Portage and Superior Railway Company) by act of March 11, 1874, lying within the granted (10-mile) limits	32	20
Exhibit B—List of indemnity lands certified to Wisconsin for Chicago, St. Paul, Minneapolis and Omaha Railroad Company on both sides of the line from Mud Lake to Superior City, Wisconsin	40	25
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1893.

oratrix, as administratrix as aforesaid, recovered against the
3 said Portage Company, a defendant in this suit, the sum of two hundred and five thousand eight hundred and eighty-three and nineteen-hundredths dollars ($205,883.19) for the damages which she has sustained as well by reason of the breach of promises and contract made with the said Horatio G. Angle in his lifetime as for the costs and charges of your oratrix by her in and about her suit in that behalf sustained, which were adjudged to your oratrix as such administratrix aforesaid in and by the said court, whereof the said Portage Company is convicted, as by the record of the said judgment in the office of the clerk of said court, reference being thereto had and to which, for greater certainty, your oratrix prays leave to refer, will more fully and at large appear.

And your oratrix further shows unto your honors that the said judgment, so recovered in manner aforesaid, re*am*ining in full force and effect, and the said $205,883.19, costs and damages aforesaid, unpaid and unsatisfied, your oratrix, on or about the 12th day of October, 1887, for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of the said court a writ of the people called a *fieri facias*, directed to the United States marshal for the western district of Wisconsin, that being the district in which said defendant resided at the time of the issuing said writ, by which said *rwit* the said marshal was commanded that of the goods, chattels, lands, and tenements of the said Portage Company in his district he cause to be made the sum of $205,883.19, which your oratrix, as administratrix aforesaid, in the said circuit court recovered against the said defendant, the said Portage Company, and that he should have the money at the clerk's office of said court, at Madison, in said district, in sixty days from the date thereof, to satisfy the judgment so recovered by your oratrix as aforesaid, and that he should have then and there that writ.

And your oratrix, administratrix as aforesaid, further shows unto your honors that the said writ of *fieri facias*, before the delivery
4 thereof to the said marshal of the said district aforesaid, was duly endorsed, and was afterward, on or about the twelfth day of October, 1887, delivered to the said marshal to be executed in due form of law.

And your oratrix, adminis-trix as aforesaid, further shows unto your honors that the said marshal of the said district aforesaid, on the second day of November, 1887, returned on the said writ, to him in that behalf directed and delivered as aforesaid, that the same was wholly unsatisfied, for the reason that he could find in his said district neither goods, shattels, lands, nor tenements of the said defendant whereon to levy the same, as by the said writ of *fieri facias* and the directions and the return of said marshal endorsed thereon as aforesaid, filed in the office of the clerk of said circuit court on the day and year last mentioned, will more fully appear, and to which or to a copy thereof your oratrix prays leave to refer.

And your oratrix further shows unto your honors that for the purpose of obtaining satisfaction of the said judgment, on the said

12th day of October, 1887, she also sued and prosecuted out of the said court a writ of the people called a *fieri facias*, directed to the United States marshal for the eastern district of Wisconsin, that being a district in which, although the said defendant did not reside therein, it was supposed that at the time of the issuing of said writ some goods, chattels, lands, and tenements of said defendant might be found; by which said writ the said marshal was commanded that of the goods, chattels, lands, and tenements of the said Portage Company, defendant, in his district, he cause to be made the sum of $205,883.19, which your oratrix recovered in said circuit court against the said defendant, and that he should have the money at the clerk's office of said court, at Madison, in said district, in sixty days from the date thereof, to satisfy the judgment so recovered by your oratrix as aforesaid, and that he should have then and there that writ.

5 And your oratrix further shows unto your honors that the said writ of *fieri facias*, before the delivery thereof to the said marshal of the said eastern district aforesaid, was duly endorsed, and was afterwards and on or about the twelfth day of October, 1887, delivered to the said marshal to be executed in due form of law.

And your oratrix further shows unto your honors that the said marshal of said district aforesaid, on or about the twenty-eighth day of October, 1887, returned on the said writ, to him in that behalf directed and delivered as aforesaid, that he returned the same wholly unsatisfied; that no goods, chattels, lands, or tenements of the defendant in his said district could be found whereon to levy the same, as by the said writ of *fieri facias* and the directions and the return of the said marshal endorsed thereon as aforesaid, filed in the office of the clerk of the said circuit court on the day and year last mentioned, will more fully appear, and to which or to a copy thereof your oratrix prays leave to refer.

And your oratrix further shows unto your honors that the said judgment still remains in full force and effect, not reversed or satisfied or otherwise vacated, and that the said Portage Company has not paid the same or any part thereof to your oratrix, as administratrix aforesaid, but has hitherto wholly neglected and refused so to do.

And your oratrix further shows unto your honors that there is now actually and equitably due to your oratrix upon the aforesaid judgment the sum of $205,883.19, less the sum of $208.50, being the amount of the costs of the said Portage Company upon the traverse of the attachment in the said cause, which last-mentioned sum in equity is liable to be set off against the said judgment aforesaid to the amount of $208.50; that after deducting the same the remains actually and equitably due to your oratrix upon the aforesaid judgment the sum of $205,674.69, together with the interest thereon from the thirty-first day of January, 1887, over and above all claims of said defendant by way of set-off or otherwise.

6 II. And your oratrix further shows unto your honors that by act of the Congress of the United States approved June 3rd, 1856, entitled "An act granting public lands to the State of

Wisconsin to aid in the construction of railroads in said State," and by another act of Congress approved May 5th, 1864, entitled "An act granting lands to aid in the construction of railroads in the State of Wisconsin," there was granted to said State to aid the construction of a railroad from a point on the St. Croix river, between townships twenty-five and thirty-one, to a point at the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of such railroad, except such of said sections or parts of said sections as might be sold, reserved, or disposed of, or to which a valid claim of pre-emption might attach prior to the definite location of such railway; also alternate odd-numbered sections or parts of said sections (commonly known as "indemnity lands") lying further than ten miles and not further than twenty miles from the line of such railroad, to an amount equal to the aggregate so excepted from the grant within the ten-mile limits, and to be selected by said State at any time after the line of such railway should be definitely fixed.

The State of Wisconsin, by a law approved October 8, 1856, entitled "An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State, approved June third, 1856," and by a joint resolution approved March 20th, 1865, entitled "A joint resolution accepting the land granted to the State of Wisconsin by an act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5th, 1864," duly accepted said grants of land; and said
7 State, on the 2nd day of March, 1858, filed a map fixing the definite location of such railway under said act of Congress of June 3rd, 1856, in the General Land Office of the United States, and on the 6th day of May, 1865, filed a certificate in said office adopting the location made on said map as the definite location under said act of May 5th, 1864, which map and certificate were accepted and approved by the Secretary of the Interior of the United States during or prior to the year 1865; whereupon the title to each and every parcel of the lands so granted, except the indemnity lands thereafter to be selected, vested in the State of Wisconsin.

And your oratrix further shows unto your honors that on and before the 4th day of March, 1874, the Chicago & Northern Pacific Air Line Railway Company was duly incorporated and organized under the laws of the States of Illinois and Wisconsin, and the State of Wisconsin, by an act of its legislature approved March 4th, 1874, entitled "An act to confer certain lands upon the North Wisconsin Railway Company and the Chicago & Northern Pacific Air Line Railway Company and to execute the trusts assumed by the State of Wisconsin by its acceptance of the grants of land made by Congress by acts approved June 3rd, 1856, and May 5th, 1864," granted to said Chicago & Northern Pacific Air Line Railway Company all the right, title, and interest which said State then held or might

thereafter acquire in all the lands included in said grant which were or could be made applicable to the construction of a railway between the "point of intersection of the branches of said grants" and the west end of Lake Superior, a distance of about sixty-five miles, such grant being subject, however, to the condition that said railway company should within sixty days from the passage of said act file with the secretary of state of the State of Wisconsin a resolution of its board of directors accepting said grant on the terms and conditions expressed in said act, and also within said sixty days give such security to the State as should be required by its
8 governor for the completion of said sixty-five miles of railway, and subject to the further condition that said company should construct and put in operation said sixty-five miles of railway by the 5th day of May, 1879.

Your oratrix annexes to and makes a part of this bill of complaint lists of the lands so granted to and vested in the State of Wisconsin lying within ten miles of the line of definite location of said railroad and by said State granted to the said Omaha Company, marked "Exhibit A;" also list, marked "Exhibit B," of those sections and parts of sections designated by odd numbers lying outside of the granted limits and within the indemnity limits of said grant which have been conveyed by the United States to the State of Wisconsin as indemnity lands under said grant and by it to the said Omaha Company, the whole of said lands being, as your oratrix is informed and believes, of a value of about four millions of dollars.

That within sixty days from the 4th day of March, 1874, said Northern Pacific Air Line Railway Company filed its acceptance of said grant and its bond of security, duly approved by the governor of said State, as required by said act of March 4th, 1874.

That said act of the legislature of Wisconsin was a grant of said lands *in presenti* to said Chicago & Northern Pacific Air Line Railway Company and, by virtue of the said acceptance thereof and the said bond to comply with its conditions, it became also a contract between said State and said company whereby the railway company then acquired all the right, title of said State in the lands granted by said acts of Congress to aid in the construction of said sixty-five miles of railway, and the State became bound to do no act to prevent a compliance by the company with its obligations under said contract.

That between the 4th day of March, 1874, and the 16th day of March, 1878, the said Northern Pacific Air Line Railway Company by authority of law duly changed its name to "The Chicago, Portage & Superior Railway Company," by which last name it is
9 made a defendant herein.

By an act of the legislature of Wisconsin approved March 16th, 1878, entitled "An act to extend the time for the construction and completion of the railway of the Chicago, Portage and Superior Railway Company," the time for the completion of said sixty-five miles of railway was extended from the 5th day of May, 1879, to the 5th day of May, 1882.

And your oratrix further shows that on or about the 18th day of

August, 1881, a contract was made and entered into by the defendant The Chicago, Portage and Superior Railway Company (hereafter called the Portage Railway Company) with the said Horatio G. Angle in his lifetime for the construction of about sixty-five miles of its railway, being the land-grant portion thereof, from a point between townships twenty-five and thirty-one to a point at the west end of Lake Superior, which said contract is the same upon which the suit was brought in this court, on the law side thereof, and upon which your oratrix, as administratrix of the estate of the said Horatio G. Angle, recovered the judgment hereinabove set out; that, by the terms of said contract, upon the completion of said road the said Horatio G. Angle was to receive as his compensation therefor the sum of $8,500 per mile in cash and $5,000 per mile of the full-paid stock of the defendant company upon condition that the same shlou-d be completed, according to the terms of said contract, on or before the time when the grant of said lands to said railway company by the legislature of Wisconsin would expire; that the said lands thus granted to the said railway company were of great value, and in case the said railway company, through its contract with the said Horatio G. Angle, had fully completed said 65 miles of railway on or before the 5th day of May, 1882, the said Portage Railway Company, defendant, would have been perfectly solvent and able to pay all of its debts, including its obligations to the said Horatio G. Angle for constructing such 65 miles of railway, and the said stock of said company would have been of great value.

Your oratrix further shows unto your honors that the said Horatio G. Angle, under his said contract, entered upon the work of construction and made such progress therein that on the 20th day of January, 1882, it had become and then was an assured fact that said railway would be completed by him, according to the terms of said contract and of the grant of the legislature of Wisconsin, on or before the 5th day of May, 1882, so as to comply fully with the condition of said grant.

And your oratrix further shows unto your honors that in the suit wherein the judgment above set out was recovered against the said Portage Railway Company the questions of fact whether the said Angle had fulfilled the contract on his part and had so far progressed as to be able to complete the same within the time above mentioned, and the further questions whether the said Portage Railway Company had, on or about the 20th day of January, 1882, abandoned the effort to complete said 65 miles of railway and had put it out of the power of said Angle to go on with the execution of said contract were tried in this court on the law side thereof and determined in favor of your oratrix as administratrix of the estate of the said Horatio G. Angle and against the said Portage Railway Company; that the said railway company failed on its part and made a breach of the said contract between it and the said Angle, and the damages recovered in said suit was the amount of damages sustained by the said Horatio G. Angle in his lifetime by reason of the breach

of said contract by the said defendant The Portage Railway Company.

III. Your oratrix further shows unto your honors that the defendant the said Omaha Company claims to be now the beneficial owner of the lands granted to the Portage Company, as above set forth by force and effect of two certain acts of the legislature
11 of the State of Wisconsin, to wit, the act approved Feb. 16, 1882, entitled "An act to revoke, annul, and resume the grant of lands made by chapter 126 of the Laws of Wisconsin for the Year 1874 to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company) and to repeal sections 8, 9, & 10 of said chapter 126, and to confer said grant of lands on the Chicago, St. Paul, Minneapolis & Omaha Railway Company," and the act approved March 5th, 1883, entitled "An act to confi*rm* the revocation, annulment, and resumption made by chapter ten of the Laws of Wisconsin for the Year 1882, and to confirm the grant of lands made by said chapter 10."

IV. But your oratrix humbly submits to your honors that said acts of the legislature of Wisconsin of March 16th, 1882, and March 6th, 1883, are and have always been null, void, and of no effect in forfeiting the title of the Portage Company and of the title, rights, and interests of your orator to said lands. Said first-named act was passed long before the date prescribed in said grant for completion of said sixty-five miles of railway. The State of Wisconsin itself, by said act, to a large extent caused the failure of the Portage Company to comply with the condition of said grant by depriving it of the credit and resources with which it was energetically engaged in complying with it when said act was passed. It would be contrary to equity and good conscience to permit a grantor to forfeit a grant for a failure of a condition subsequent, which failure such grantor wilfully caused or contributed to, and the said acts are in violation of the Constitution of the United States, because, if valid, their effect would be to impair the obligation of the said contract between the State of Wisconsin and the Portage Company.

V. Your oratrix further submits to your honors that even though the said last-named acts of the legislature of Wisconsin vested the legal title to said lands in the Omaha Company, yet said company cannot be permitted by a court of equity to hold said lands
12 or their proceeds against the creditors of the Portage Company, because the Omaha Company wilfully and wrongfully, by fraud and through the treachery of officers of the Portage Company, prevented it from complying with the condition of said grant under the circumstances and in the manner next hereinafter set forth,

The Omaha Company, in 1880–1881, had constructed that part of the line of railway, indic*tade* in the acts of Congress above referred to, from the St. Croix river to Bayfield, and had received the large and valuable grant of landapplicable to so much of the said line, but it found it necessary to build a branch to Superior City, which was then of growing importance as the terminus of the Northern Pacific Railway and the commercial center of the region of the upper lakes.

The Omaha Company therefore located a branch to Superior City, almost at a right angle from its Bayfield line, running parallel to and but a few hundred yards distant from the located line of the Portage Company. It then made a vigorous effort in the legislature of Wisconsin, early in 1881, to wrest the land grant from the Portage Company. The attempt was defeated chiefly through the opposition of one A. A. Jackson, then general solicitor and director of the Portage Company, and that of the Chicago, Milwaukee & St. Paul Railway Company, and the Chippewa Valley & Superior Railway Company, which corporations had great influence with the legislature.

The Portage Company had broken down in the panic of 1873–'4 under a large load of debts and embarrassments and had laid dormant until late in 1880. Its stockholders and creditors then employed one Willis Gaylord to find parties able and disposed to revive it and put it on the way to success. On the 10th of September, 1880, he contracted provisionally with William H. Schofield, of New York, an experienced railway projector and financier, to take the presidency and general management of the company, and with the New York, New England and Western Investment Company, a
13 corporation engaged in the business of negotiating railway loans (hereafter for convenience called the Investment Company), to place a new mortgage for the Portage Company, which provisional contract was made final and obligatory by a second contract between the same parties, executed January 10th, 1881, both of which contracts were ratified and approved by the Portage Company. In these agreements it was imperatively provided that all of the stock, bonds, mortgages, claims, judgments, and demands then outstanding against the Portage Company should be surrendered and cancelled; that a new mortgage for the sum of $25,000 per mile, being an aggregate of $10,200,000, should be executed, and that $700,000 of the new bonds and $1,000,000 of the new stock should be issued in full satisfaction of all such outstanding stock, bonds, and other demands, which were to be surrendered and cancelled.

In order to make practicable a negotiation of the new bonds it was assumed to be necessary to insure to new investors a control of a majority of the capital stock of the Portage Company, and it was therefore provided that six of the ten millions of authorized capital stock might be sold with the new bonds by the investment company, and that the one million dollars of new stock, to be issued in redemption and payment of the stock then outstanding and other liabil-ties of the company, should be placed in escrow with said trust company, to be delivered only in ten per cent. instalments as each ten miles of the railway might be completed or as each $250,000 of the new bonds might be sold.

On the 16th of June, 1881, the parties to the two contracts last-above named entered into a third contract (in which the Portage Company joined), modifying their said former contracts in respect of the obligations, powers, and compensation of the investment company, providing for a cash loan by the investment company to

the Portage Company, and continuing in full force all other provisions of said former contracts. A copy of each of these three contracts (hereafter called "the reorganization contracts") is
14 hereto attached and made a part hereof, marked respectively Exhibits "D," "E," and "F."

In pursuance of said reorganization contracts the Portage Company, on the 17th day of June, 1881, executed and placed in escrow with said trust company certificates for one million of dollars of its capital stock, all in the name of said A. A. Jackson and endorsed by him in blank, and at the same time made its several orders, to the number of ninety, on said trust company, each order calling for the delivery to John C. Barnes or bearer of a designated amount of said million of dollars of stock, in ten per cent. instalments, as each ten miles of said railway might be completed or as each $250,000 of its bonds might be sold, which orders were duly accepted by said trust company subject to said condition as to time of delivery of stock. All of such accepted orders were of the same tenor and effect, except as to the number of shares of stock deliverable under each respect-vely. A copy of one of such orders and of the acceptance inscribed thereon is hereto attached and made a part hereof, marked "Exhibit G."

The Portage Company thereupon delivered said ninety orders to said John C. Barnes in exchange for and redemption and satisfaction of all the theretofore outstanding stock of the Portage Company, which stock was at once cancelled, except two certificates amounting to $25,000, which by oversight or design of Charles J. Barnes, vice-president of the Portage Company, remained in his custody uncanceled.

As soon as the Portage Company had secured a satisfactory reorganization, including the funding of its old debts and cancellation of all its outstanding stock on terms such as would enable it to secure to new investors the control of a majority of the capital stock, and consequently of the management of the company, the new president of the Portage Company, William H. Schofield, and the investment company sought the alliance and support of the
15 Grand Trunk Railway Company of Canada, which had recently completed an extension of its line (called the Chicago & Grand Trunk railway) to Chicago and was then looking out for a further extension from Chicago to the Northern Pacific at Superior City. Attracted by the short and favorable line of the Portage Company, its command of valuable territory, its large amount of right of way obtained and superstructure completed, and especially its magnificent grant of lands, the representatives of the Grand Trunk Railway of Canada, through Joseph Hickson, the general manager and one of the directors of said company, on the 16th of June, 1881, entered into a provisional contract with the Portage Company for a sale of its bonds to supply means for the immediate construction and equipment of its railway. This preliminary contract was followed and modified by a contract executed in London, England, and dated July 10th, 1881, between the Portage Company, on the one part, and

Sir Henry Whatly Tyler, who was president of the Grand Trunk Railway Company of Canada, and Sir Charles Lawrence Young, who — vice-president of said company, as trustees for themselves and others, on the other part. This last-named contract was followed and modified by a fuller and more formal contract, executed in London on the 30th of September, 1881, between the Portage Company, of the first part, said Schofield, of the second part, said Tyler and Young, of the third part, and the Chicago and Grand Trunk Railway Company, Limited, of the fourth part.

These three contracts (hereinafter called "the loan contracts") *and* hereto attached and made part of this bill of complaint, marked respectively Exhibits "H," "I," and "J." They provide that the new mortgage of the Portage Company shall be duly executed and recorded, all prior debts and liens released and extinguished, the amount of new bonds applicable to such debts and liens limited to $972,000; the remainder of the $10,200,000 of bonds put on the market under these contracts, 51,000 out of the 100,000 shares of the capital stock of the company issued and placed in escrow to be-
16 come the property of the new investors if and when they should sell the required amount of bonds in the time prescribed, but prior to placing such stock in escrow and examination to be made by said Joseph Hickson as to the value of the land grant and as to the removal of all existing liens prior to that of the new mortgage, and, if such examination should prove satisfactory, the sum of $50,000 to be advanced by the Chicago and Grand Trunk Railway Company, Limited, for the immediate uses of the Portage Company on $100,000 of its new bonds as collateral.

The said reorganization contracts and said loan contracts were constating agreements and said loan contracts were made, with the full understanding of all the parties thereto, to the effect that the surrender and cancellation of all the old stock of the Portage Company and the withholding of delivery of the new stock, as prescribed in the said orders on said trust company ("Exhibit G"), were essential and fundamental conditions of said loan contracts, on the faithful observance of which depended the power of the officers and directors of the Portage Company to carry out the provisions of such contracts respecting control of their company.

All the terms, conditions, effects, intents, and purposes of each of said reorganization contracts and said loan contracts were fully known and understood by each of the defendants, except said trust company, on and prior to the 19th of January, 1892, and had been duly ratified and approved by the Portage Company and by said A. A. Jackson, director and general solicitor, and said C. J. Barnes, director and vice-president of said company; and each of defendants, except said trust company, well knew that if said million dollars of stock, which carried with it the control of the corporation, were to be taken from said trust company in violation of the condition on which it was deposited and should fall into the possession and ownership of any person or corporation hostile to the construction of the Portage Company's railway and hostile to the retention

by the company of its land grant, said Chicago and Grand
17 Trunk Railway Company, Limited, would thereby be compelled to abandon all attempts to carry out said loan contracts.

After the execution of the last of the said loan contracts and pending the examination by the said Joseph Hickson into the condition of the Portage Company and the value of its land grant the Portage Company did everything in its power to insure the completion of said sixty-five miles of railway by the 5-h of May, 1882, and to prevent hostile legislation. To this end, in the fall of 1881 and early in the winter of 1882 it borrowed large sums of money and expended the same in pushing the construction of said land-grant division, so that on the 19th of January, 1882, more than half of the substructure of said division was completed. Over sixteex hundred men were at work upon it, and its construction in ample time to lay the rails and complete the division before May 5th, 1882, was assured. The said Joseph Hickson had made his examination for the Chicago and Grand Trunk Railway Company, Limited, and, finding all matters affecting the condition of the company and the value of its land grant to be as they had been represented, had declared his satisfaction therewith to the president of the Portage Company, and was prepared to pay and about to pay to him the $50,000 cash advance provided for in said loan contracts, and at the same time, relying on the said advance of $50,000 and on a further advance of $50,000 which the president of said Chicago and Grand Trunk Railway Company, Limited, verbally assured to Portage Company would be made to it if and when needed, the Portage Company bought in Chicago, for immediate delivery at Superior City, the steel rails and fastenings necessary to complete said land-grant division. Said Portage Company could and would have completed said sixty-five miles of railway before the 5th day of May, 1882, but for the wrongful acts of the defendant Omaha Company hereinafter set forth.

The defendant The Omaha Company and one Henry H. Porter
and one Ransom R. Cable, in or about the month of January,
18 1882, well knowing the fact that the Portage Company owed a large amount of debts contracted on the faith and security of said land grant, wrongfully conspired to and did injure and defraud the creditors of the Portage Company by preventing the construction of its railway and by wresting from it its large and valuable land grant.

In pursuance of such conspiracy the Omaha Company, on the 10th day of January, 1882, when it had become obvious that if let alone the Portage Company would complete its said land-grant division before the 5th of May, 1882, entered into a contract in writing with the Chicago, Milwaukee & St. Paul Railway Company and the Chippewa Valley & Superior Railway Company whereby said three railway corporations agreed to get control of the Portage Company if practicable and to exert all their influence with the legislature to take away the land grant of the Portage Company and give it to the Omaha Company. The mutual considerations for this contract were that three-fourths of the land so to be wrested from the Portage

Company should go to the Omaha Company and one-fourth to the Chippewa Valley and Superior Railway Company, and that the right of way, surveys, and grades of the Portage railway south of the land-grant division should be transferred to the Chicago, Milwaukee & St. Paul Railway Company. Each of these three companies knew of the arrangements above set forth with the managers of the Grand Trunk railway for the construction of the Portage line as an extension of the Grand Trunk system, and their object in seizing control of the Portage Company was not only to divide its property among them, but also to shut out the Grand Trunk railway from competition for the trade of Wisconsin and the Northwest. A copy of said last-named contract is attached to and made a part hereof, marked "Exhibit K."

Having thus secured the co-operation of said two great and influential railway corporations in procuring the desired legislation, the Omaha Company, Ransom R. Cable, and Henry H. Porter,
19 who was then *who was then* president of said defendant, The Omaha Company, in pursuance of said conspiracy, on or about the 19th day of January, 1882, fraudulently induced said Charles J. Barnes, then a director and vice-president, and A. A. Jackson, then a director and general solicitor of said Portage Company, to join said conspiracy and aid said conspirators in preventing the construction of the railway of the Portage Company in wresting from it its large and valuable land grant and in causing the same to be given to the Omaha Company.

The interests of the Portage Company and its creditors were peculiarly in the keeping and dependent on the fidelity of these two officers, C. J. Barnes and A. A. Jackson, because all the stock of the company had got into their custody. All the other officers and directors with one exception lived in New York and New England. The meetings of the directors were generally held in the East. The president, since the date of reorganization, had been almost constantly in England, Canada, and New York carrying on negotiations for the company, and the practical work of location and construction of the line and protection of the company from efforts of rivals to deprive — of its land grant were in the hands of these trusted officers, the said Jackson having then recently received from the company a cash fee for services as its solicitor at the legislative session of the legislature of Wisconsin of 1881 in preventing the then attempted spoilation of its land grant by the Omaha Company, and also a cash retainer for services to be rendered by him in preventing such hostile legislation at the session just begun. These facts as to the relations of said Jackson and Barnes to the Portage Company and their power over it and its business were well known to the said Omaha Company and the said Porter and Cable on and before the 19th day of January, 1882, and constituted in fact the inducement which led them to contract with said Jackson and Barnes to betray their trusts, as hereinafter set forth. This bargain was made at Chicago on the 19th of January, 1882, and was
20 reduced to writing and executed by said Cable, on the one part, in the interest and at the instance of said Omaha Com-

pany, and by the said Charles J. Barnes and A. A. Jackson, for themselves and as attorneys-in-fact for John C. Barnes, on the other part, on the 20th of January, 1882. A copy of said contract is hereto annexed and made a part hereof, marked "Exhibit L." By its terms the said Cable agree to pay to said Barnes and Jackson, in their individual right and interest, the sum of two hundred thousand dollars, and placed said sum in the control of L. J. Gage, trustee, for delivery as follows, to wit:

1. The sum of $31,500 to be paid to said Jackson as an inducement for the wrongful transfer to said Cable or his order of the said one million of dollars of stock of the Portage Company, which had by inadvertence of the president of said company and by his order been permitted to pass from said trust company into the hands of said Charles J. Barnes as vice-president, but which in his hands was still subject to all the conditions as to issue to which it had been subject while held by said trust company. This million of dollars of new stock and the $25,000 of old stock held by said Barnes as vice-president for cancellation comprised all of the stock of the Portage Company then executed, the rest of the old stock having all been cancelled, and the million of dollars of "J. C. Barnes' stock" referred to in the contract under consideration, as well as the $5,100,000 of stock contracted for to the Chicago & Grand Trunk Railway, Limited, never having been issued. These facts were all well known to the defendants, excepting said trust company, at the date of said contract.

2. The sum of $17,250 to be paid to said Charles J. Barnes as an inducement for the wrongful transfer to said Cable of said 250 shares of old stock, which belonged to the Portage Company and was then in his official custody for cancellation, as defendant Omaha Company well knew.

21 3. The sum of $67,000 for the assignment and delivery to said Cable of certain notes of the Portage Company made and delivered to said A. S. Barnes, trustee, for moneys borrowed, and of all right of said A. S. Barnes, trustee, to $2,500,000 of first-mortgage bonds of the Portage Company held as collateral to said loan, and also for a surrender to the Portage Company of $100,000 of its bonds (commissions for making said loan), then held and partly earned by said Charles J. Barnes.

4. The sum of $84,250 to be paid to said Charles J. Barnes when said Cable or his assigns should get "actual control and possession of the Portage Company, its property and franchises," by means of the stock and bonds so transferred to him, and when John C. Spooner (general counsel of the Omaha Company) and I. C. Sloan (who had been counsel for the Portage Company, assisting said Jackson to prevent hostile legislation at the preceding session) should certify that an act had been passed at that session taking the land grant from the Portage Company and giving it to the Omaha Company. This sum was a bribe to said Jackson and Charles J. Barnes for their influence as officers of the Portage Company in assisting said Cable or his assigns in securing control of the company, its

property and franchises, and in securing also a legislative forfeiture and transfer of its land grant.

On the day this agreement was verbally made, the 19th of January, 1882, the said Joseph Hickson, agent of said Chicago and Grand Trunk Railway Company, Limited, having completed at Chicago his said examination of the Portage Company, had received from the president of said company $100,000 of its bonds as collateral to the advance of $50,000 provided for in said loan contracts, and was about — pay over said sum when, at the instigation of their said co-conspirators and for the purpose of preventing said Chicago and Grand Trunk Railway Company, Limited, from aiding the Portage Company, said Jackson and Barnes informed said Hickson that they had sold and delivered to said Cable the entire
22 stock of the Portage Company then issued, including the one million dollars of stock which said Hickson supposed to be still held in escrow, said Cable being well known to said Hickson as the representative of interests hostile to the Portage Company and anxious to procure a forfeiture of its land grant and to prevent any extension to the northwest of the Grand Trunk Railway system.

Thereupon the Chicago and Grand Trunk Railway Company, Limited, surrendered to the president of said Portage Company the $100,000 of bonds deposited as collateral as aforesaid, and refused to advance the said sum of $50,000, or the further sum of $50,000, or to proceed further in carrying out said loan contracts, for the reason that such sale and delivery of stock to Cable was in violation of the essential condition of said contracts, as hereinbefore set forth.

The president of said Portage Company being cut off by said contract of January 20th, 1882, from said cash advances by said Chicago and Grand Trunk Railway Company, Limited, and from further payments on said A. S. Barnes' loan, surrendered his contract and countermanded his order for rails and fastenings to complete said sixty-five miles of railway.

In further execution of said conspiracy the said Omaha Company, on the 19th or 20th of January, 1882, at Chicago, Illinois, informed the general manager of the Portage Company of the terms, purpose, and effect of said contract of that date, and advised and induced him to telegraph officially to A. C. Titus (who was chief engineer of the company in charge of the work of constructing said land-grant division and who had seven engineering corps then at work upon it) to forthwith call in his staff, suspend work, pay off his employees, and sell the instruments and other property of the company in his possession, and also caused said general manager to notify the contractors on said division that the control of the company had been changed and the said English capitalists forced out, and also telegraph to merchants in Duluth and Superior City, who were furnishing on the credit of the company large amounts of supplies
23 for the 1,600 men at work on said sixty-five miles of line, saying that the company had been sold out and advising

them to protect themselves, because the company could not pay or protect them.

These orders and notices were sent by the general manager of the Portage Company on the 20th of January, 1882, and the result was that on their receipt, about the 24th of January, all the engineer corps of the company broke up and dispersed, all the provisions, supplies, animals, tools, material, and other personal property belonging to the company and the contractor on the line were attached at the suit of said merchant creditors, and the 1,600 men employed on that division stopped work, dispersed, and wandered to Superior City and Duluth, where, in the depth of winter, penniless and unemployed, they were forced to appeal to the public and private charity for relief.

In further pursuance of said conspiracy the defendant The Omaha Company endeavored to get immediate control of the organization of the Portage Company, so as to prevent any resistance being made by it to a bill which it had caused to be introduced in the Wisconsin legislature on the 21st of January, 1882, to forfeit the grant to that company and confer it on the Omaha Company. To this end it entered into negotiations with the president of the Portage Company and with the investment company and offered them large money inducements to turn over to said conspirators the organization of the Portage Company, including the chief officers and a majority of the board of directors. Failing in this, it caused a bill to be filed by said Ransom R. Cable in the circuit court for Cook county, Illinois, against the Portage Company, falsely charging the president and board of directors with intent to cheat and defraud said Cable by incurring improvident obligations and otherwise, thus impairing the value of the $1,025,000 of stock purchased by said Cable, as above set forth, and praying for a temporary
24 injunction, which was granted without hearing or notice and issued on the 11th of February, 1882, restraining the president and other officers of the Portage Company from doing any act or thing whatsoever in the name or behalf of the company during the continuance of such injunction. At the instigation of said conspirators, this bill was sworn to by said Barnes, vice-president of the Portage Company, and the injunction granted thereon was served on the president and several directors of said company who had assembled in Chicago to take measures for its protection. By means of said injunction, thus wrongfully and fraudulently obtained, said company and all its officers who remained faithful to their trusts were completely disabled for the time being from effective opposition to the scheme of said conspirators.

In further pursuance of said conspiracy said Omaha Company caused the fact of abandonment of work on said sixty-five miles of railway and the dispersion of the forces engaged thereon to be promptly and widely published throughout Wisconsin, and especially among the members of the legislature at Madison, then in session, taking care to conceal, however, the means by which the collapse of the Portage Company had been effected. Furthermore, it and, at its instance, others employed by it, and especially the said

A. A. Jackson and C. J. Barnes, who were weel know- as officers of the Portage Company and understood to be authorized to speak in its behalf, falsely represented to members of said legislature that the Portage Company had made no substantial progress towards the construction of said land-grant division and had never had any considerable number of men at work thereon and was wholly without means or credit to prosecute such; that it had at last voluntarily and finally abandoned all attempt to construct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon the legislature of Wisconsin, relying on these false representations and without inquiry or hearing, hurriedly passed the act of February 16th, 1882, above named,
25 to forfeit the land grant of the Portage Company and confer it on the Omaha Company.

Until the issuing of the injunction against the president and directors of the Portage Company and the passage of said act of February 16th, 1882, a majority of the directors of the Portage Company and the said investment company sustained the president of the Portage Company in a struggle to save the company and its property from destruction at the hands of said conspirators; but on being advised of the issuing of said injunction and the passage of said act of forfeiture the said investment company (which had nominated and still controlled several of the directors of the Portage Company) made terms with said Cable, and in consideration of a cash bonus assigned to him its rights under said reorganization contracts, placed in his hands the resignations of said directors, and delivered to him a large amount of stock and securities belonging to the Portage Company held by it as collateral and otherwise; thereupon all further resistance to the plans of said conspirators on the part of directors and other officers of the Portage Company was abandoned as useless, and on the 6th day of May, 1882, the Omaha Company, in further pursuance of said conspiracy, effected a reorganization of said Portage Company, whereby a large majority of the board of directors were chosen in the interest of the Omaha Company for the sole purpose of consummating the object of said conspiracy. Since this reorganization the Portage Company has been in a state of suspended animation, doing nothing to construct its railway or to protect its creditors by removing the cloud on its title to said lands, but kept alive by its rival, the Omaha Company, solely for use as a tool to defeat the purpose for which it was created and to cheat its creditors by acquiescing in the spoilation of its land grant.

VI. Your oratrix further shows unto your honors that in the trial of the case, wherein the judgment in her favor hereinbefore set out was rendered, it was duly shown in the evidence and found
26 by the jury and determined by the judgment of the court that the failure to construct said land-grant division was not attributable to the said Horatio G. Angle, but solely to the calamities which befell the Portage Company, as above set forth.

VII. In the year 1882 the Omaha Company constructed its branch to Superior City, above referred to, alongside of the partially con-

structed line of the Portage Company, and has ever since operated the same, and the governor of Wisconsin, erroneously assuming said acts of the legislature of said State of February 16th, 1882, and March 6th, 1883, to be valid, has caused to be issued to said Omaha Company patents from said State to said company for a large part of said lands granted to the Portage Company, as above set forth, or selected as indemnity lands under said grant.

VIII. The Omaha Company has sold and conveyed a considerable part of said lands and has contracted to sell and convey other portions thereof, and has executed leases and permits to cut timber thereon and remove the same, and continues to so dispose of and authorize waste upon said lands and under such leases and permits a great deal of the timber on said lands, is being cut down and removed, and *and* as a chief part of the value of said lands consists of the timber thereon, the removal of such timber tends to depreciate the value of said lands and to render them unsalable.

IX. The Portage Company -as no real or personal property of any considerable value or at all sufficient to satisfy the claims of your oratrix herein other than the lands granted to it as aforesaid.

X. Your oratrix is informed that said Portage Company, on or about the 1st day of January, 1881, did make, execute, and deliver to the said trust company it- deed of trust, whereby it conveyed to said trust company all of its property of any and every de-
27 scription whatsoever, including the lands then or thereafter to be acquired by it under the grant above mentioned, in trust to secure the payment of certain bonds and interest coupons thereto attached, as specifically set forth and described in said mortgage, and that a suit is now pending in this honorable court, wherein said trust company is complainant and said Portage Company and said Omaha Company and others are defendants, to subject to the payment of such bonds and interest the lands granted to said Portage Company and now held by said Omaha Company and the proceeds of sales and leases thereof and damages for depredations thereon which may have been heretofore received by said Omaha Company, in which suit the amount of principal and interest due by the Portage Company on said bonds is being litigated. Your oratrix is informed that the whole amount of bonds and interest claimed to be due to said trust company under said mortgage is less than one million of dollars, and that the lands and proceeds of lands held by the Omaha Company, as above set forth, but belonging to said Portage Company or equitably applicable to its debts, aggregate in value several millions of dollars and are abundant to pay and discharge all of the debts of said Portage Company in full.

Your oratrix further shows unto your honors that after the commencement of the suit aforesaid against said Portage Company on the law side of this court, during the lifetime of the said Horatio G. Angle, in February, 1882, and which at his death was revived, with your oratrix as plaintiff, and in which down to the time of the trial and judgment entered herein, as above set out, the said defendant, The Omaha Railway Company, has been the real defendant in interest and has had control and direction of the defense; that the

said company procured the witnesses to be produced on the trial of said cause: that the said company paid the expenses of said witnesses in attending said suit; that the said company, although it did not appear upon the record in said case as defendant, did
28 appear, by its counsel, Mr. Howe, of St. Paul, the counsel and solicitor of said company, and, as your oratrix is informed and believes, employed all the other counsel who have appeared in said cause and have paid all the expenses of the litigation on the part of the defendant.

And your oratrix claims that the land grant above mentioned, consisting of about 400,000 acres of valuable land in the State of Wisconsin, which has passed to and become the property of the said Omaha Railway Company, is in equity in the hands of said company chargeable with the payment of said judgment herein set out; that by the course and conduct of the said defendant, The Omaha Railway Company, it has made itself in equity chargeable as trustee in its own wrong, and is therefore liable to have such lands and the proceeds thereof in its hands subjected to the payment of said judgment.

In tender consideration whereof, as your oratrix is remidiless in the premises by the strict rules of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable, your oratrix prays that this honorable court will give her relief as follows:

I. That the judgment be decreed to be a lien on all the lands herein specifically described, granted by the United States to the State of Wisconsin to aid in the construction of said sixty-five miles of railway and granted by said State to the Portage Company, as above set forth, including all lands which have been or may hereafter be certified to said State as indemnity lands or otherwise under said grant and on any other real property held by said Portage Company in this district.

II. That a writ of injunction be issued by and out of this honorable court or by one of the judges thereof enjoining and restraining the Portage Company and the Omaha Company and each of them, pending this litigation, from selling, leasing, disposing of, levying upon, incumbering, or in any manner interfering with any of
29 the lands granted as aforesaid or any notes, bonds, or other values now held by them or either of them arising from sales, rents, or stumpages, license charges, or proceeds of sale of any such property.

III. That a writ of injunction be issued by this honorable court or by one of the judges thereof enjoining and restraining the defendants until the further order of the court herein from selling or causing to be sold or in any manner disposing of any of the bonds of the Portage Company, and especially any such bonds acquired by them or either of them in the course of the transactions above set forth, whereby the Omaha Company obtained possession and control of the debts, property, and organization of the Portage Company.

IV. That pending this action a receiver be appointed, having the

usual powers of receivers in like cases, to take possession of, manage, control, and dispose of as the court may direct all the real and perronal property, rights, privileges, and franchises of the Portage Company, including all of said granted lands, except such as may have been *bona fide* sold and conveyed by the Omaha Company prior to the commencement of this suit, and to take an account of all moneys, notes, bonds, and other valuables which have been received by the Omaha Company on account of sales, leases, stumpages, trespasses, or otherwise from said lands and of expenditures made by said company on account thereof.

V. Your oratrix further prays that said Omaha Company be required to account for, pay over, and deliver as the court may direct all moneys, notes, bonds, and other valuables received by it in any manner from said lands, together with interest on said moneys (less any reasonable and proper expenses incurred in the management or sale thereof) to an amount not exceeding the aggregate of debts due or to become due by the Portage Company, including the debt to your oratrix above set forth.

30 VI. That such an amount of the notes, bonds, and other values which may be so delivered up by the Omaha Company and also of the said lands remaining unsold by the Omaha Company be sold as shall be sufficient, when added to the moneys so paid over by said company, to pay and discharge the debts of the Portage Company, together with the commissions, expenses, costs, and charges of this action and of any decrees, orders, and proceedings which may be had or rendered herein, and that out of the moneys so received all amounts adjudged to be due and payable to your oratrix and all proper costs and charges herein be paid.

VII. That complainant have decree for costs against defendants and such other and further relief as equity and good conscience may require.

May it please your honors to grant unto your oratrix the people's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the defendant the said Portage Company, and also a like writ, to be directed to the defendant the said Omaha Railway Company and to their counsellors, attorneys, solicitors, trustees, and agents, severally, therein and thereby commanding and strictly enjoining the said defendants severally and the persons before mentioned in manner aforesaid.

And may it please your honors to grant unto your oratrix the people's writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said defendants, the said Portage Company and the said Omaha Company and the said Farmers' Loan & Trust Company, therein and thereby commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, that they be and appear before the judges of the circuit court of the United States for the western district of Wisconsin, at the court-room, in the city of Madison, then and there to answer all and singular the premises (but not under oath,

31 answer under oath being expressly waived), and to stand to and abide by and perform such orders and decrees therein as

to your honors shall seem agreeable to equity and good conscience; and your oratrix will ever pray, etc.

LAMB & JONES,
Complainant's Solicitors.

EWING & SOUTHARD,
J. R. DOOLITTLE,
Of Counsel.

UNITED STATES OF AMERICA,
City & County of New York, State of New York, } ss.:

On this 14th day of April, one thousand eight hundred and eighty-eight, personally came before me Mrs. Sarah R. Angle, who, being duly sworn, saith that she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of her own knowledge except as to the matters and things therein stated upon information and belief, and as to those matters she believes it to be true.

SARAH R. ANGLE.

Sworn to before me this 14th day of April, 1888.
[SEAL.]
W. E. STIGER,
Notary Public, N. Y. Co.

32 EXHIBIT A.

List of lands granted to the State of Wisconsin by act of Congress of June third, 1856, and May 5th, 1864, and granted by said State to the Chicago & Lake Superior Air Line Railway Company (now the Chicago, Portage & Superior Railway Company) by act of March 11, 1874, lying within the granted (10-mile) limits.

The following land lying in Burnett county, Wisconsin, to wit:

All of sections number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25) twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five, in township number forty (40) north, range twelve (12) west.

Also all of sections number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty (40), range thirteen (13) west.

Also all of sections number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), except the east half of said section twenty-five (25); twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty (40), range fourteen (14) west.

Also sections number three (3), five (5), seven (7), nine (9), eleven (11), except the east half of the east half of said section eleven (11); all of section fifteen (15), seventeen (17), nineteen (19), twenty-one

(21), twenty-three (23), except the west half of the northwest quarter of said section twenty-three (23), and all of section twenty — (27), except the southwest quarter thereof; also all of sections twenty-nine, thirty-one, and thirty-three, in township number forty (40), range eleven (11) west.

33 Also all of sections number one (1), three (3), nine (9), eleven (11), thirteen (13), fifteen (15), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty-one (41), range thirteen (13) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty-one (41), range twelve (12) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), fifteen (15), seventeen (17), nineteen (19), and twenty-one (21), in township number forty-one (41), range eleven (11) west.

Also all the undivided one-half of sections number thirteen (13), twenty-three (23), twenty-five (25), twenty-seven (27), thirty-one (31), thirty-three (33), and thirty-five (35), in said township number forty-one (41), range eleven (11) west.

Also all of the undivided half of sections number five (5), the northwest quarter of section number seven (7), north half of the northeast quarter and the south half of the northwest quarter of section one (1), all in township number forty-one (41), range ten (10) west.

Also all of sections number three (3), five (5), seven (7), nine (9), seventeen (17), and the north half of section nineteen (19), and the undivided half of sections fifteen (15), twenty-three (23), twenty-seven (27), twenty-nine (29), thirty-one (31), and thirty-three (33), in township number forty-two (42) north, range ten (10) west.

Also all of sections three (3), five (5), seven (7), nine (9), eleven (11), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), and all of section one (1) except the east half of the east half thereof,

34 and also the west half of *of* section thirteen (13), all in township forty-two (42), range eleven (11) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five, all in town. number forty-two (42) north, range twelve (12) west.

Also all of sections one (1), three (3), nine (9), eleven (11), thirteen (13), fifteen (15), nineteen (19), twenty-three (23), twenty-five (25), twenty-seven (27), thirty-three (33), and thirty-five (35), all in township forty-two (42) north, range thirteen west.

Also the following lands lying in Douglass county, Wisconsin, to wit:

All of sections one (1), three (3), the east half of section- seven (7), all of section eleven (11), thirteen (13), fifteen (15), seventeen (17), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), the east half of section twenty-nine (29), all of sections thirty-three (33) and thirty-five (35), all in township number forty-three (43), range thirteen (13) west.

Also all of sections number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-three (43), range twelve (12) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-three (43), range eleven (11) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-seven (27), twenty-
35 nine (29), thirty-one (31), and thirty-three (33), in township number forty-three (43), range ten (10) west.

Also all of sections three (3), five (5), seven (7), nine (9), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-four, range ten (10) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five, in township forty-four (44), range eleven (11) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), all in township forty-four (44), range twelve (12), west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), except the west half thereof; all of twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), thirty-three (33), and thirty-five (35), in township forty-four (44), range thirteen (13) west.

Also all of sections one (1), three (3), five (5), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), except the west half thereof; all of thirty-three (33), and thirty-five (35), in township forty-five (45), range thirteen (13) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five, in township forty-five, range twelve (12) west.

36 Also all of sections one (1) except the east half of the southeast quarter thereof, all of sections three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), except the east half of the northeast quarter and east half of the southeast quarter thereof; all of sections fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), except the west half of the west half thereof; all of twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-five (45), range eleven (11) west.

Also all of sections three (3), five (5), seven (7), nine (9), fifteen (15), except the east half thereof; all of seventeen (17), nineteen (19), twenty-one (21), thirty-one (31), thirty-three (33), in township forty-five (45), range ten west.

Also all of sections three (3), five (5), seven (7), nine (9), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-seven (27), twenty-nine (29), thirty-one (31), and thirty-three (33), in township forty-six, range ten west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty-six (46), range eleven (11) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty-six (46), range twelve (12) west.

Also all of sections number one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-three (33), and thirty-five (35), in township forty-six (46), range thirteen (13) west.

Also all of sections one (1), eleven (11), except the west half thereof, and all of section thirteen (13), in township forty-six, range thirteen (13), west.

37 Also all of sections one (1), three (3), five (5), seven (7), except the west half thereof; all of nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), except the west half of northwest quarter and southwest quarter thereof; all of section twenty-one (21), except the southwest quarter thereof; twenty-three (23), twenty-five (25), twenty-seven (27), and thirty-five (35), in township forty-seven (47), range fourteen (14) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven

(27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-seven (47), range thirteen (13) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township number forty-seven (47), range twelve (12) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-seven, range eleven (11) west.

Also all of sections five (5), seven (7), seventeen (17), nineteen (19), twenty-one (21), except the northeast quarter thereof; all of sections twenty-nine (29), thirty-one (31), and thirty-three (33), in township forty-seven (47), range ten (10) west.

Also the southwest quarter of section number thirty-one (31), in low township forty-eight, range ten (10) west.

Also all of sections three (3), five (5), seven (7), nine (9), eleven (11), except the east half thereof; all of sections thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), and twenty-five (25), except the east half thereof; all of sections twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-
38 three (33), and thirty-five (35), in township forty-eight (48), range eleven (11) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-eight (48), range twelve (12) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-eight (48), range thirteen (13) west.

Also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-eight (48), range fourteen (14) west.

Also all of sections one (1), eleven (11), thirteen (13), twenty-three (23), except the west half of the west half thereof, and all of section twenty-five (25), in township forty-eight (48), range fifteen (15) west.

Also all of sections fifteen (15), thirteen (13), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-nine (49), range fourteen (14) west.

Also all of sections number thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-nine (49), range thirteen (13) west.

Also all of sections thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-nine (49), range twelve (12) west.

39 Also all of sections seventeen (17), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and thirty-five (35), in township forty-nine (49), range eleven (11) west.

40 EXHIBIT B.

List of Indemnity Lands Certified to Wisconsin for C., St. P., Minn. & O. R. R. Co. on Both Sides of the Line, from Mud Lake to Superior City, Wis.

Parts of sections.	S.	T.	R.	Area.	Remarks.
Selection May 12, 1883.		N.	W.		Bayfield district.
W ½ n e ¼, w ½ s e ¼, & w ½	5	41	13	482.61	
S e ¼ n e ¼, w ½ n e ¼, s e ¼, & w ½	7	"	"	622.78	
W ½ n e ¼, w ½ s e ¼, & w ½	17	"	"	480	
All	19	"	"	562.46	
W ½ n w ¼ & w ½ s w ¼	29	"	"	160	
Lot 1, n w ¼ s e ¼, w ½ n e ¼, & w ½	31	"	"	499.33	
N w ¼ n w ¼ & lots 4, 5, 6, & 7	5	42	13	152.25	
All	7	"	"	619.90	
S w ¼ n e ¼, w ½ s e ¼, s w ¼, & l'ts 1, 2, & 3	17	"	"	395.75	
All	19	"	"	667.20	
W ½ n e ¼, w ½ s e ¼, & w ½	29	"	"	480	
N e ¼ n e ¼, n w ¼ n w ¼, s ½ s w ¼, & s ½ s e ¼	31	"	"	254.61	
N ½ n w ¼, e ½ n e ¼, & s ½	1	41	14	481.70	
All	3	"	"	604.63	
N e ¼ & s ½	5	"	"	480.51	
All	7	"	"	560.93	
All	9	"	"	490.94	
N e ¼ n w ¼, s ½ n w ¼, n e ¼, & s ½	11	"	"	600	
All	13	"	"	640	
All	15	"	"	640	
All fract'l	17	"	"	294.02	
All	19	"	"	587.92	
All	21	"	"	573.88	
All	23	"	"	546.01	
All	25	"	"	631.62	
41 All	27	41	14	586.25	
All	29	"	"	624.88	
All	31	"	"	495.03	
All	33	"	"	464.36	
All	35	"	"	360.94	
All	1	42	14	640.48	
All	3	"	"	643.28	
W ½ s w ¼, n e ¼ s e ¼, s ½ s e ¼, & n ½	5	"	"	553.48	
Forward				16,857.75	
				16,857.75	
N e ¼ n e ¼, s ½ n e ¼, s e ¼ s e ¼, & w ½	7	42	14	506.48	
E ½ n e ¼	9	"	"	80	
All	11	"	"	640	
All	13	"	"	596.23	

EXHIBIT B—Continued.

Parts of sections.	S.	T.	R.	Area.	Remarks.
All	15	42	14	640	
W ½ n e ¼, n ½ n w ¼, w ½ s w ¼, n ½ s e ¼, & s w ¼ s e ¼	17	"	"	360	
S w ¼ s w ¼, n ½ s w ¼, & n ½	19	"	"	459.20	
Lots 1 & 2, s w ¼ n w ¼, e ½ n w ¼, s w ¼ s w ¼, n ½ s w ¼, & e ½	21	"	"	597.97	
N w ¼ s w ¼, e ½ s w ¼, n w ¼, & e ½	23	"	"	600	
E ½ n e ¼ & e ½ s e ¼	25	"	"	160	
N w ¼ s w ¼, w ½ n e ¼, & n w ¼	27	"	"	280	
S w ¼ n e ¼, n ½ n e ¼, s ½ s e ¼, & w ½	29	"	"	520	
All	31	"	"	659	
N w ¼ n e ¼, s ½ n e ¼, & s ½	33	"	"	440	
N e ¼ s e ¼ & s ½ s e ¼	35	"	"	120	
N w ¼	7	43	9	158.20	
N ½ s w ¼, s w ¼ s w ¼, s e ¼, & n ½	1	"	10	605.94	
All	11	"	"	640	
W ½ s e ¼ & n ½	13	"	"	400	
S e ¼ & w ½	23	"	"	480	
42 E ½	27	"	"	320	
Selection June 14, 1883.					Bayfield district.
N w ¼ s w ¼, n e ¼ s e ¼, s ½ s e ¼, & n ½	5	"	14	462.32	
N e ¼ s w ¼, s ½ s w ¼, n ½ s e ¼, s w ¼ s e ¼, & n ½	7	"	"	561.88	
W ½	9	"	"	320	
N ½ s w ¼, s w ¼ s w ¼, n ½ s e ¼, s w ¼ s e ¼, & n ½	17	"	"	560	
N e ¼ n e ¼, s ½ n e ¼, w ½ n w ¼, & s ½	19	"	"	525.98	
N e ¼ n w ¼ & n e ¼ s w ¼	21	"	"	80	
N w ¼ n e ¼, s ½ n e ¼, & s ½	29	"	"	440	
N ½ n w ¼, s ½ s w ¼, & e ½	31	"	"	491.02	
Forward				29,561.97	
				29,561.97	
N w ¼ n w ¼, s e ¼ n w ¼, & s w ¼ s w ¼	33	43	14	120	
N ½ s e ¼ & w ½	7	44	"	401.02	
S e ¼ n e ¼, s e ¼, & w ½	17	"	"	520	
N w ¼ s e ¼, s ½ s e ¼, s w ¼, & n ½	19	"	"	603.88	
S e ¼ n w ¼, n ½ s w ¼, & s w ¼ s w ¼	21	"	"	160	
N ½ s w ¼, s e ¼, & n ½	29	"	"	560	
N e ¼ s w ¼ & e ½	31	"	"	360	
Total				32,286.87	Approved August 13, 1887.
Selection April 30, 1887.					Falls St. Croix district.
All	1	40	14	505.52	
Lots 1, 2, 3, & 4 & n e ¼ s w ¼, s ½ s w ¼, s w ¼ s e ¼, & n w ¼	3	"	"	390.08	
All fract'l	5	"	"	425.80	

EXHIBIT B—Continued.

Parts of sections.	S.	T.	R.	Area.	Remarks.
Lots 1 & 2 & e ½ ne ¼, s w ¼ ne ¼, & s e ¼	7	40	14	312.42	
All	9	"	"	591.45	
All	11	"	"	411.26	
All	13	"	"	449.07	
43 Lot 1 & s e ¼ ne ¼, w ½ n w ¼, & s ½	15	"	"	476.10	
Lots 1, 2, 5, & 6 & n e ¼ ne ¼, s ½ s w ¼, & s ½ s e ¼	17	"	"	295.15	
All fract'l	19	"	"	498.96	
All	21	"	"	640	
N e ¼, n ½ n w ¼, s e ½ n w ¼, & s ½	23	"	"	570.21	
Lots 2, 3, & 4 & s w ¼ s w ¼	25	"	"	196.10	
Lots 2 & 3 & s w ¼ ne ¼, ne ¼ se ¼, w ½ se ¼, & w ½	27	"	"	580.10	
All	29	"	"	555.54	
All	31	"	"	497.98	
E ½	33	"	"	320	
All	35	"	"	640	
All	1	"	15	367	
Lot 3 & n e ¼, s ½ s w ¼, & s e ¼	3	"	"	330.73	
All	9	"	"	640	
Forward				9,693.47	
				9,693.47	
All	11	40	15	525.92	
All	13	"	"	489.22	
N e ¼, n e ¼ n w ¼, s ½ n w ¼, & s ½	15	"	"	600	
N ½ n e ¼ & lots 1, 2, 4, & 5	17	"	"	238.07	
All fr'l	21	"	"	628.56	
All fr'l	23	"	"	596.68	
All fr'l	25	"	"	176.23	
All fr'l	27	"	"	599.20	
All fr'l	29	"	"	521.90	
Lots 9, 10, 11, & 12 & e ½ s e ¼	31	"	"	257	
N ½ s w ¼, n ½ s e ¼, s e ¼ s e ¼, & n ½	33	"	"	520	
Total				14,796.75	
Selection June 14, 1883.					Bayfield, now Ashland, district.
N ½ s e ¼, s w ¼ s e ¼, s w ¼, & n ½	1	43	15	596.12	
44 N e ¼, n ½ n w ¼, s e ¼ n w ¼, & s ½	11	"	"	600	
S ½ n e ¼, n w ¼, & s ½	13	"	"	560	
E ½ n e ¼, e ½ s e ¼	15	"	"	160	
N w ¼ n e ¼, s ½ n e ¼, n ½ n w ¼, s e ¼ n w ¼, n e ¼ s w ¼, & s ½ s w ¼	23	"	"	360	
S e ¼, e ½ s w ¼, & n ½	25	"	"	560	
E ½ n e ¼ & e ½ s e ¼	27	"	"	160	
N e ¼ n w ¼, s ½ n w ¼, n ½ s w ¼, s e ¼ s w ¼, & e ½	35	"	"	560	
N w ¼	31	44	14	165.95	
W ½	33	"	"	320	
S w ¼ s w ¼ & s e ¼ s e ¼	1	"	15	80	

EXHIBIT B—Continued.

Parts of sections.	S.	T.	R.	Area.	Remarks.
N ½ n e ¼, s w ¼ n e ¼, s w ¼ n w ¼, e ½ n w ¼, & n w ¼ s w ¼	11	44	15	280	
E ½	13	"	"	320	
W ½ n e ¼	15	"	"	80	
E ½ n w ¼, s w ¼, & e ½	23	"	"	560	
All	25	"	"	640	
All	35	"	"	640	
Total				21,438.82	Approved December 1st, 1887.
Selection March 10, 1885.					Bayfield, now Ashland, district.
All	9	47	10	640	
W ½	11	"	"	320	
N e ¼, E ½ n w ¼, & s ½	15	"	"	560	
N e ¼	21	"	"	160	
All	23	"	"	640	
All	25	"	"	640	
E ½	27	"	"	320	
All	35	"	"	640	
All	19	48	"	642.06	
N w ¼ n e ¼, n w ¼, n e ¼ s e ¼, & w ½ s e ¼	29	"	"	320	
45 N ½ n e ¼, s w ¼ n e ¼, n w ¼, n w ¼ s w ¼, n e ¼ s e ¼, & s ½ s e ¼	31	"	"	434.11	
N ½ s w ¼, s e ¼ s w ¼, s e ¼, & n ½	33	"	"	600	
All	1	"	11	642.55	
E ½	11	"	"	320	
All	13	"	"	640	
E ½	25	"	"	320	
All	25	49	"	640	
All	27	"	"	640	
Total				9,118.72	Approved Dec. 1, 1887.
Selection May 12, 1883.					Bayfield, now Ashland, district.
N e ¼ n e ¼	7	41	13	40	
S ½ n w ¼ & w ½ n e ¼	1	"	14	160.70	
N w ¼ n e ¼ & lot 3	5	42	13	77.79	
S e ¼ n e ¼, w ½ n e ¼, e ½ n w ¼, s w ¼ n w ¼, n ½ s e ¼, & n ½ s w ¼	31	"	"	414.61	
E ½ n e ¼, s e ¼, e ½ s w ¼, & s w ¼ s w ¼	27	42	14	360	
S ½ n e ¼, n w ¼ s e ¼, e ½ n w ¼, s w ¼ n w ¼, & n ½ s w ¼	35	"	"	320	
W ½ n e ¼, w ½, w ½ s e ¼	3	46	"	451.95	
All	5	"	"	600.20	
All	7	"	"	636.50	
Forward				3,061.75	
				3,061.75	
All	9	46	14	640	
N w ¼, n ½ s w ¼, s e ¼ s w ¼	11	"	"	280	
All	17	"	"	640	
N ½	21	"	"	320	
N e ¼ n e ¼	23	"	"	40	

EXHIBIT B—Continued.

Parts of sections.	S.	T.	R.	Area.	Remarks.
E ½ s e ¼	13	43	10	80	
All	7	44	9	640.58	
N e ¼, n e ¼ s e ¼, lots 1, 2, 3, 4	19	"	"	389.92	
N e ¼, w ½ n w ¼, s e ¼ n w ¼, s ½	31	"	"	602.60	
All	1	"	10	643.54	
46 E ½	11	"	"	320	
All	13	"	"	640	
E ½ n e ¼, e ½ s e ¼	23	"	"	160	
Lots 1, 2, 3, 4, 6, 7, 8	25	"	"	338.44	
E ½ n e ¼, e ½ s e ¼	35	"	"	160	
All	5	45	"	636.20	
All	7	"	"	624.82	
All	9	"	"	640	
All	17	"	"	616.57	
All	19	"	"	537.50	
All	29	"	"	640	
All	31	"	"	637.96	
All	1	"	10	638.82	
All	11	"	"	640	
All	13	"	"	478.66	
E ½	15	"	"	320	
All	23	"	"	625.45	
All	25	"	"	601.26	
N ½, n ½ s w ¼, s w ¼ s w ¼, s e ¼	27	"	"	596.98	
All	35	"	"	556.11	
All	29	46	9	640	
All	31	"	"	637.60	
All	25	"	10	640	
All	1	"	15	612.62	
All	3	"	"	615.16	
N e ¼, n ½ s e ¼, s w ¼ s e ¼	11	"	"	280	
S w ¼	7	47	14	161.40	
Forward				21,333.94	
47 Forward		N	W	21,333.94	
W ½ n w ¼, s w ¼	17	47	14	240	
All	19	"	"	643.82	
S w ¼ n e ¼, n w ¼ n w ¼, s e ¼ n w ¼	29	"	"	120	
S ½	33	"	"	320	
W ½ n e ¼, w ½, w ½ s e ¼	1	"	15	474.69	
N ½, n ½ s w ¼, s w ¼ s w ¼, s e ¼	3	"	"	594.98	
Lots 1, 2, 3, 4	7	"	"	153.70	
All	9	"	"	640	
N ½ n e ¼, s w ¼, s ½ s w ¼, s e ¼	11	"	"	600	
All	13	"	"	640	
All	15	"	"	640	
All	23	"	"	640	
All	25	"	"	640	
Lot 5	7	48	"	41.52	
Lots 1, 2, 3, 4, 5, 7, 8	9	"	"	144.35	
All	15	"	"	633.40	
All	17	"	"	640	
Lots 1, 2, 3, 4	19	"	"	166.38	
N ½ s w ¼, n ½ s e ¼, s w ¼ s e ¼	21	"	"	600	
W ½ n w ¼, w ½ s w ¼	23	"	"	160	
N e ¼, n e ¼ n w ¼, s ½ n w ¼, s ½	27	"	"	600	
All	29	"	"	640	

EXHIBIT B—Continued.

Parts of sections.	S.	T.	R.	Area.	Remarks.
Lots 1, 2, 3, 4	31	48	15	159.50	
All	33	"	"	640	
N ½ s w ¼, w ½ s e ¼, s e ¼ s e ¼	35	"	"	600	
N w ¼ s e ¼, e ½ s e ¼, & n e ¼	27	47	"	280	
All	21	"	"	640	
All	35	"	"	640	
Total				34,266.28	Approved Dec. 9, 1887
Grand total				97,110.69	

48 EXHIBIT D.

Whereas, Willis Gaylord, of the city and county of New York, does, by contract and agreement in writing expressed, hold, for the purposes of negotiation, sale or transfer, all rights, franchises privileges, land grants, property and interest of the Chicago, Portage and Superior Railway Company, a corporation organized under the laws of the States of Illinois and Wisconsin, for the purpose of locating, constructing and operating a railway from the city of Chicago, in the State of Illinois, to Superior City and Duluth in the State of Wisconsin; and,

Whereas the said Willis Gaylord is desirous of securing the services of the New York, New England and Western Investment Company, as financial agent of said railway company, to undertake the sale and negotiation of the first-mortgage bonds of said railway company and the sale of the said railway company's land grant of about 450,000 acres of land in the State of Wisconsin, and from such sales of said bonds and lands and any other assets of said railway company, now owned, held or possessed, or hereafter to be acquired, secure the means necessary to build and equip said railway from Chicago and Duluth, or parts thereof, and

Whereas, the said Willis Gaylord is desirous of securing the co-operation and services of Wm. H. Schofield, personally and as the president of said railway company, in securing subsidies, right of way, contracts for construction and equipment and operation, and, as such president and general manager of construction, equipment and operation of such railway, aid, to the best of his ability, personally and officially, in securing the speedy completion of said railroad or parts thereof, and to co-operate with the said investment company in negotiating the bonds and land of said railway company, by sale or exchange, so as to best secure the means to build and equip said road, and

Whereas, it is necessary to the satisfaction of the said investment company that an examinatien of the past history, corporate and official proceedings, and the present legal status of the rights,
49 franchises, property, books, papers &c. of said railway company be made before the said investment company can de-

termine or decide to assume the financial management and direction of the said railway company, and proceed to the negotiation and sale of the said bonds, lands and other property and assets;

Now, therefore, it is mutually and jointly agreed by and between Wilis Gaylord, of the city and county of New York, in the State of New York, party of the first part, the New York, New England and Western Investment Company, party of the second part, and William H. Schofield of the city and county of New York in the State of New York, party of the third part, as follows:

The said Willis Gaylord agrees to furnish or cause to be furnished and paid to the said investment company a retaining fee of six hundred ($600) dollars, and for and in consideration of such retaining fee the said investment company will make or cause to be made, by the aid and co-operation of the said William H. Schofield, a careful and thorough examination of the railway aforesaid, and all its rights, franchises, privileges, corporate and property rights assets, &c., and to this end and for this purpose the said Willis Gaylord is to furnish the said investment company and the said William H. Schofield all the information that he, the said Gaylord possesses, or may be by him acquired, and all books, papers, documents, and evidences of the organization of said railway company, its surveys, rights of way, land grant and all other things which may tend to a full and complete knowledge and understanding by the said Schofield and the said investment company of the status, condition and holdings of the said railway company; and upon the completion of such examination and investigation, which is to be made as speedily as possible after the signing of this preliminary agreement, the said William H. Schofield is to make a written report to the said investment company of the results and conclusions arrived at through said examination, and thereupon the said investment company is to examine said report and the statements therein, and have the right to call for satisfactory evidence of the correctness of said statements, such as charter, land-grant deed, or act securing such, grant, or any other documentary evidence necessary to complete authentication of said report. And if such examination shall establish the value of the franchise, right, property and all other matters involving the success of the enterprise to the satisfaction of the investment company, then it, the said investment company will at once undertake the business of said railway company as its financial agent under a new or final contract, among which shall be the following conditions:

The said Gaylord is to provide or agree to have provided the means by which a new mortgage and deed of trust can be executed and recorded in the proper offices in the States of Illinois and Wisconsin, and to have engraved and properly executed a new series of first-mortgage bonds, and new books of stock, which shall represent the entire property of the said railway company, and to be exchanged, as far as may be agreed, for the present outstanding first-mortgage bonds and stocks; and to cause the present mortgage to be released of record and the bonds issued thereunder and said stock to be canceled. The investment company shall nominate a trustee

for appointment by the railway company, subject to the approval of the said Gaylord and the said Schofield.

As soon as the investment company shall determine to accept the financial agency of the said railway company the said Gaylord shall cause a reorganization of the said railway company, in which reorganization he, the said Gaylord, shall nominate five directors, the investment company shall nominate five (5) directors, and Wm. H. Schofield shall be the eleventh director; and he, the said Gaylord shall also secure the election of the said Wm. H. Schofield as president and general manager of construction and operation of said railroad. The offices of vice-president, secretary and treasurer shall be designated by the mutual agreement between the said Gaylord and the said investment company, and the same be elected thereto.

51 An executive committee of three (3) shall be elected, the president being one, and the said Gaylord and the said investment — each to designate one.

The said Gaylord shall put the newly elected president and board of directors in possession of all books, papers, franchises, rights property and all other assets of the company, and to secure as aids to the completion of the enterprise the co-operation and assistance, by advice, counsel and otherwise of all those now interested in and to be benefitted by the building of said road.

And whereas, in the securing of said railway company's charter, land grants, rights of way, surveys, about sixty miles of road-bed graded, and other lawful and proper expenses there has been over seven hundred thousand dollars of money expended, which is represented by the aforesaid charter, land grant, rights of way and other property, it is to be provided that out of the new series of first-mortgage bonds, there is to be set apart and made a special trust seven hundred (700) of said new first-mortgage bonds of $1,000 each; also ten per cent. of the capital stock of the company, and, by the order in writing of said Willis Gaylord, countersigned by the president of said railway company, paid to the persons entitled to receive the same, as designated by the said Gaylord, in full liquidation and satisfaction of all claims and demands (except as hereinafter stated) of the present owners of said railway, and for all expenditures and claims made and due for said charter, land grant, right of way, surveying, grading and all and every expense on account of said railway company (not including a certain amount of floating debt now outstanding which does not exceed forty thousand dollars (40,000) and to be -rovided for hereafter), and the aforesaid $700,000 in first-mortgage bonds are to have the interest coupons for the first two years from their date cut off and cancelled; and the said bonds together with ten per cent. of the capital stock as aforesaid are to be placed in trust as a special trust, and be delivered to the par-

52 ties entitled to receive the same, as designated by the said Gaylord, to be delivered, however, only *pro rata* as the other bonds and stock are delivered for material or money, and as the road is constructed and put in operation in sections of ten (10) miles each.

And whereas there is in the form of floating debt in lawful and proper claims, approximately but not exceeding $40,000, it is to be provided that when, through said examination, the enterprise is found to be satisfactory to said investment company and the proposed new bonds and stock are prepared and deposited as herein provided for, then said investment company will proceed at once to the negotiation of the same, and will, as soon as cash to the amount of $40,000 shall have been procured, pay or cause to be paid said sum to A. S. Barnes & Co., in payment of said floating debt, and on such payment being made, the re organization or substitution of new directors and officers of said railway company as herein provided shall then take place.

And the said Gaylord shall furnish satisfactory evidence and assurance that the said $700,000 of first-mortgage bonds and ten per cent. of capital stock will pay, cancel and fully release all claims, demands and incumbrances against said railway company, except said floating debt, and that the floating debt aforesaid does not and shall not exceed $40,000.

The said Gaylord shall provide money, not exceeding in amount $7,000 to be used in the securing local subsidies, rights of way, retaining fee, printing bonds and stock, preparing and recording mortgage and all other necessary provisions precedent to the construction of said road or a part thereof; that said money to be secured and satisfied by ten (10) of the aforesaid new series of first-mortgage bonds of $1,000 each, to which ten (10) bonds there shall be added 100 shares of stock of $100 each.

After the setting apart of the said ten (10) bonds and 100 shares of stock for preliminary expenses aforesaid, the 700 bonds and ten per cent. of the capital stock for the satisfaction of the present
53 owners of charter, etc., as aforesaid; and the bonds to cover the floating debt of nominally $40,000 as aforesaid, then all the remainder of the new series of the first-mortgage bonds, all the land grant and other negotiable property of the railway company shall be placed under the control of the said investment company as the financial agent of the railway company, for sale, negotiation or exchange, provided that in the agreement hereinafter mentioned as a final contract, a limit shall be prescribed as to the amount of bonds and stock per mile, and the price at which said bonds shall be sold or disposed of, and of the price and manner of sale of the lands derived from the grant aforesaid.

The investment company is from that time to advertise and use all reasonable efforts to negotiate the aforesaid first-mortgage bonds, land grant or land-grant bonds for money, material and equipment necessary to the construction and equipment of said railway and to pay all expenses of any kind connected with such negotiations.

And it is to be provided that fifty per centum of all the stock of said railway company shall be set apart to be used by the said investment company in its discretion in promoting the sale of said bonds. All the balance of the capital stock not herein otherwise disposed of shall be held in the name of and subject to the disposal

of the president of said railway company in procuring right of way, local subsidies, and in payment of preliminary or incidental expenses during construction.

And it is to be provided that the president of said railway company be entitled to and secured in the receipt of a salary of $5,000 per annum, to be paid in cash out of any moneys on hand or in the treasury, and that all his travelling or other expenses necessarily incurred in the business of the company be so paid in cash; but after the payment of said expenses, and not less than three-fifths of the annual salary of the president in cash, then, if there shall be, at the end of the year, any deficiency in the payment of the salary of said president, the balance of said salary so unpaid shall be paid to said president in the first-mortgage bonds of the company at seventy (70) per centum, and an amount of stock equal to the face value of said bonds.

And whereas, it is assumed by the said investment company, the said Willis Gaylord and the said Wm. H. Schofield, that after the payment of the $10,000 in bonds and the $10,000 in stock to cover the preliminary expenses in examination, printing bonds and stock, and preparing and recording mortgage, the expenses connected with the procuring of the right of way and local subsidies, &c., also the $70,000 of bonds and ten per cent. of the capital stock in payment to the present owners, and the $40,000 to cover the floating debt, and the ten per cent. commissions to the investment company, there can, by careful and judicious management of the assets of the company, be saved something of a surplus of bonds and money and the land-grant bonds or the lands after paying all the proper and lawful expenses of construction and equipment of said railroad, it is hereby mutually agreed that we, the said parties to this contract will use every effort in our power to so dispose of the money, bonds, ands, and negotiable assets of the company, and so manage the construction and equipment of the road as will be most economical and wise, including always good work and the best of material. And if and when the said work of construction and equipment shall be completed there shall be a surplus of money, bonds and lands, or in part, either or all of these, then said surplus of said money bonds or lands shall be divided in the following manner: To the investment company as extra compensation, one-third of all such surplus; to the said Willis Gaylord, for himself and his associates, one-third of all such surplus, and to Wm. H. Schofield and his associates one-third of all such surplus.

The investment company is to have full and exclusive authority to negotiate, sell exchange or otherwise dispose of all of said bonds and fifty per cent. of the stock, and all the land or land-grant bonds of the railway company for the purposes and subject to the conditions only of the contract to be made hereafter as herein contemplated; for its services, counsel fees, brokerage and other expenses connected with said negotiation, it is to have and receive a commission of ten per centum on the amount of said bonds, land-grant bonds or other negotiable property, payable in said bonds at par or in the proceeds thereof at its option; also a

further commission of ten per centum on the amount of stock to be issued, payable in said stock at par, both payable only from time to time as said bonds and stock or other property may be negotiated, sold exchanged or otherwise used in anf for the construction and equipment of said railway.

The president is to sign all orders for the delivery of bonds and stock, and the necessary documents to complete the transfer of any lands or other negotiable property of the company on the request of the investment company.

All exchanges or transfers of bonds, stock lands or other property of the railway company by the said investment company to be approved and authorized by the president of said railway company.

The president of said railway company is to report to the said Gaylord in writing, from time to time, the progress of the negotiations and work of construction and such other matters as may be provided in said final contract.

And the said Wm. H. Schofield will when elected to the office of president and general manager of construction and operation of said railway company's railroad according to the conditions hereinbefore stated, accept and enter upon such office, and give his personal attention to all the details of organization, securing of subsidies rights of way, contracts for construction, and also at all times co-operate with and aid, as he may be required, as herein contemplated by the new and final contract aforesaid, the said investment company in its work of negotiating, selling and disposing of the bonds and stock or other negotiable assets of said railway company.

And it is also to be agreed that the work of constructing said railway, in making new surveys, obtaining local aid, &c., shall
56 be commenced at or near Chicago within thirty days after the aforesaid reorganization of the company, and the work shall be pushed on to completion of the railway between Chicago and the eastern terminus of the North Pacific railway within the time required by law so as to make available the grant of United States lands given in aid of the construction of said Chicago, Portage & Superior railway.

In witness whereof the parties have subscribed this agreement on the 20th day of September. 1880.

(Signed) W. GAYLORD.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT CO.,
By J. C. SHORT, *Pres't.*
WM. H. SCHOFIELD.

57 EXHIBIT E.

Whereas, on or about the twentieth day of September, one thousand eight hundred and eighty, an agreement in writing was entered into between Willis Gaylord of the city ot New York, of the first part, the New York, New England and Western Investment Company, a body corporate, hereinafter called the investment com-

pany, of the second part, and William H. Schofield of the city of New York, of the third part, to which reference is hereby made.

And whereas, the said parties have entered upon the performance of the said agreement, and the party of the third part has made his report to the party of the second part as in said contract provided and the party of the second part has determined to accept the financial agency of the railway company mentioned in said contract

Now therefore, the said parties do hereby further covenant and agree together as follows, it being especially understood and agreed between them that in case anything herein contained shall be at variance or conflict with the provisions of the said contract, the said contract shall be and hereby is modified and annul-ed in the said particulars so far as is necessary to give full effect to these presents and no further.

First. The party of the first part nominates as the five directors to be nominated by him, as in said contract mentioned, the following persons to wit: Nelson Luddington, C. J. Barnes, A. A. Jackson, Wm. H. Barnum and Willis Gaylord, and the party of the second part nominates as the five directors to be nominated by it as in the said contract mentioned, the following persons to wit: Thomas Rutter, Charles Place, Wm. P. Watson, Frank Shepard and —— ——, and it is agreed that the party of the third part shall be the eleventh director and shall also be president and general manager of the construction and operation of the said railway.

Second. It is agreed that C. J. Barnes shall be vice-president and Willis Gaylord the secretary and Wm. P. Watson the treas-
58 urer of the said company, and the party of the first part nominates —— ——, as a member of the executive committee, and the investment company nominates Willis Gaylord as a member of the said committee, the party of the third part, being the third member of said committee, as in said contract agreed.

Third. The money heretofore expended, as in said contract recited, in securing the charter of the railway company and in grading and other expenditures being over seven hundred thousand dollars, which is represented by the charter, land grants, rights of way and other property of the said railway company, is to be provided for by the setting aside forthwith after the reorganization aforesaid out of the bonds issued under the mortgage, herein mentioned, of seven hundred of the said bonds of one thousand dollars each, and of one million dollars of the capital stock of said railway company at par (instead of ten per cent. of the said capital as in said contract recited) which bonds and stock are to be held by the Farmers' Loan and Trust Company, in special trust to be paid out and delivered only on proper orders in words as follows to wit:

To the Farmers' Loan & Trust Company:

This is to certify that for value received, —— —— is entitled to have and receive — of the first-mortgage bond- of one thousand dollars each, and — shares of the capital stock of the Chicago, Portage and Superior Railway Company, which bonds and stock have been fully paid for and placed in your keeping as a special trust

for delivery upon this order. And you are hereby authorized and directed to accept, or certify in the usual manner, this order for the delivery of said bonds and stock and to deliver to the bearer hereof — of the said bonds and — shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first-mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, the New York, New England & Western Investment Company, or whenever and as often as any ten miles of the railroad of said rail-
59 way company shall be built, as will be certified to by the president of said railway company; and in any event you are hereby directed to deliver to the bearer on the first day — —— 1883, any of the said — bonds and — shares of capital stock then remaining undelivered upon the surrender of this order therefor, all past-due coupons to be cut off when making said deliveries which orders shall be duly executed by the president of said railway company and accepted by the said trustee and delivered to order of said first party forthwith after the reorganization as aforesaid ten per cent. of the special trust bonds and stock to be delivered as each ten miles of the railroad is built, or two hundred and fifty thousand dollars of bonds are sold by the said railway company or by the investment company, and if any bonds or stock remain undelivered two years after date of bonds, they shall then be delivered or surrender-or order therefore, and all coupons which are past due at the time of any delivery of bonds sha'l be cut off and cancelled before the bonds are delivered.

Fourth. The sum of forty thousand dollars mentioned in the contract betwe*en*t the parties hereto, as being approximately the amount of the floating indebtedness of the said railway company, is to be paid, as soon as cash to that amount shall have been actually realized from the sale of the bonds, or otherwise provided by the investment company to A. P. Barnes & Company, or their assigns, in payment and satisfaction of the said floating debt, but only on their furnishing to the party of the second part evidence satisfactory to it of the entire payment and satisfaction of such floating debt and the entire amount thereof.

Fifth. The party of the first part shall furnish to the party of the second part satisfactory evcidence and assurances that the seven hundred first-mortgage bonds and the one million of dollars of capital stock above mentioned will be sufficient to pay, cancel and fully release and discharge all the claims, demands and in-
60 cumbrances against the said railway company of every sort and description, except the said floating debt, and that the said fla*o*ting debt does not and shall not exceed the said sum of forty thousand dollars.

Sixth. The party of the first part shall provide funds forthwith after the signing of this agreement, or as the same may be needed, to the amount of seven thousand dollars, to be used in securing local subsidies, rights of way, retaining fees, printing bonds and stock, preparing and recording mortgage and all other necessary disbursements and provisions precedent to the commencement of the

construction of the railway or any part thereof, as hereinafter provided, and he is to receive for said sum ten of the said bonds and one hundred shares of the capital stock of the said railway company.

Seventh. It is further agreed that after the setting apart of the said ten bonds and one hundred shares of stock for preliminary and other expenses, as aforesaid, and the said seven hundred bonds and one million dollars of stock for the satisfaction of the existing claims against said railway company as aforesaid held by the present owners of the charter, then all the remainder of the new series of bonds and all the land grants and other negotiable property of the railway company shall be placed under the control of the investment Company as the financial agent for the railway company for sale, negotiation and exchange, and that from the first moneys then realized by the investment company, the said sum of forty thousand dollars shall be paid as above provided. The bonds shall be issued at a rate not exceeding twenty-five thousand dollars per mile. The stock shall be issued in one-hundred-dollar shares at a rate of not over thirty thousand dollars per mile. The bonds shall bear coupon interest at the rate of six per cent. and shall be sinking-fund land-grant bonds secured by a mortgage to the Farmers' Loan
61 and Trust Company as trustee, which bonds and mortgage shall contain such covenants and conditions and be of such form as the party of the second part and the said trust company and its counsel shall prescribe and approve.

Eighth. The investment company shall, from the time that the bonds shall be placed in its hands for negotiation as aforesaid, advertise and use all reasonable efforts to negotiate and dispose of the same for cash, material or equipment necessary to the construction and equipment of the said railway, and it shall pay all expenses of every kind which may be incurred by it in connection with such negotiations.

Ninth. One-half, or fifty per centum, of all the stock of the said railway company shall be set apart to be used by the investment company in its discretion in promoting the sale and negotiation of the said bonds. All the remainder of the capital stock not herein otherwise disposed of shall be held in the name of and be subject to the disposal of the president of the railway company in procuring rights of way and local subsidies, and in payment of preliminary incidental expenses during the construction of the said railway.

Tenth. The salary of the party of the third part as president of the said railway company shall be five thousand dollars per annum and he shall also be entitled to be reimbursed, his travelling and other expenses necessarily incurred in business of the company. At the end of every year, however, if there shall be two-fifths or less of the said salary due and unpaid to the president, and if all the said disbursements and expenses have been properly paid to him, it shall be optional with the railway company to pay such unpaid balance of salary in first-mortgage bonds of the company at the rate of seventy per centum with an amount of stock equal to the face value of said bonds.

Eleventh. If, after the completion of the work of construction and equipping the said railway, there shall remain a sur-
62 plus of money, bonds or lands or any of them, then all such surplus of said money, bonds or lands shall be distributed as follows: To the order of said Willis Gaylord party of the first part, one-third thereof, and to the said William H. Schofield and to such persons as he may designate as entitled to share in the same as his associates, or as persons whom he may have interested with himself as contractors or otherwise in the construction of the road, two-thirds of all such surplus.

Twelfth. The investment company shall have the full and exclusive authority to negotiate, sell, exchange or otherwise dispose of all the said bonds and fifty per cent. of the said stock, and all the land or land-grant bonds of the railway company, and for its services, counsel fees, brokerage and other expenses connected with said negotiation, it is to have and receive a commission of ten per centum of the amount of the said bonds or other property payable in the said bonds at par, or in the proceeds thereof at its option, and also a further commission of ten per cent. on the amount of stock to be issued, payable in said stock at par, and both said bonds and stock are to be payable only from time to time as said bonds and stock or other property may be negotiated, sold, exchanged or otherwise used, such commission being payable whenever said bonds shall have been legally issued, so as to be obligatory against the said railway company.

Thirteenth. The party of the third part as president of the said railway company, is to sign all orders for the delivery of bonds and stock and all documents necessary to complete the transfer of any lands or other negotiable property of the company on request of the investment company, and all exchanges or transfer of bonds, stock, lands or other property of the railway company by the investment company, shall fail of validity until approved and duly authorized in writing by the said party of the third part, as
63 president of the said railway company. The said party of the third part as such president is to report to the party of the first part in writing, from time to time, the progress of the negotiation and work of construction.

Fourteenth. It is further agreed that the parties hereto will use their best efforts to commence at or near Chicago, within thirty days of the reorganization of the company, the work of making new surveys, obtaining local aid or in any other way advancing the interest of the company in the work of construction of the road, and also to push on to completion the work of construction between Chicago and the eastern terminus of the Northern Pacific railway or at least to the completion of so much thereof as shall be necessary and within the time required by law to make available and secure the grant of United States lands given in aid of the construction of the Chicago, Portage and Superior railway.

Fifteenth. The parties hereto further agree that except as the same is hereby changed or modified, the said agreement between

the said parties dated September 20th, 1880, shall be and the same is in all respects ratified and confirmed.

In witness whereof, the parties of the first and third parts have hereunto set their hands and seals, and the party of the second part has caused these presents to be signed by its president this twentieth day of January, one thousand eight hundred and eighty-one.

WILLIS GAYLORD.

[SEAL.] THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY,

By J. C. SHORT, *Pres't.*

ALBERT WM. P. WATSON, *Sec'y and Treas.*

WM. H. SCHOFIELD.

CITY, COUNTY, AND STATE OF NEW YORK:

On the 20th day of January, 1881, before me personally came Willis Gaylord and William H. Schofield, to me known to be
64 two of the individuals described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

On the same day before me personally came John C. Short, to me known to be the president of the New York, New England and Western Investment Company, whose name is subscribed to the above instrument, and acknowledged that he subscribed the same as such president, and that the said company executed the same for the uses and purposes therein set forth; and I further certify that I know the seal affixed to the said instrument to be the corporate seal of said company.

ISIDOR GREYHEAD,
Notary Public, N. Y. Co.

EXHIBIT F.

Agreement made and concluded this 16th day of June, A. D. 1881, by and between the New York, New England & Western Investment Company of the first part, the Chicago, Portage & Superior Railway Company of the second part, Willis Gaylord of New York of the third part and William H. Schofield of New York, of the fourth part:—

Whereas two contracts were entered into by and between said Willis Gaylord, representing the Chicago, Portage & Superior Railway Company aforesaid, of the first part, the said New York, New England and Western Investment Company of the second part, and said William H. Schofield of the third part, and dated respectively September 20th A. D. 1880, and January 20th A. D. 1881, for the purpose, among other things, of authorizing the said New York, New England and Western Investment Company to act as financial agents for and sell the securities of the said Chicago, Portage & Superior Railway Company and completing or causing the completion and equipment of the said railway company's railroad, as in and by

said two contracts will fully and at large appear, reference thereto being had; and

Whereas, circumstances have arisen whereby it has become
65 expedient to arrange and contract with other parties, for better terminal facilities, traffic and trackage alliances and commercial strength in connection with the sale of the bonds of the said railway company, at better prices and to secure such greater trackage terminal and commercial advantages and means for the more successful competition with existing lines of railroad; and

Whereas, firm contracts have been made and entered into by the parties hereunto of the second, third and fourth parts, securing the terminal facilities, traffic and trackage alliances, commercial strength, and sale of said railway company's bonds aforesaid; and

Whereas, the New York, New England and Western Investment Company is willing to promote the above-mentioned interests and purposes of the said railway company, and to aid in carrying into execution the arrangements aforesaid.

Now therefore this agreement witnesseth, that, 1. The New York, New England and Western Investment Company hereby relinquishes to parties hereunto of the third and fourth parts, seventy-five (75) per cent. of the ten per cent. (10) commissions in bonds or money, and capital stock stipulated to be paid to it, in and by said contract of January 20th, 1881 and in consideration thereof, said second, third and fourth parties hereunto do hereby release, acquit and discharge the said New York New England & Western Investment Company of and from the performance of all and singular the obligations duties and services agreed to be performed by it, in and by the said two contracts of September 20th 1880 and January 20th, 1881 or in and by either of them.

But it is hereby agreed and covenanted that the said New York, New England and Western Investment Company shall have and receive at the times and in the manner stated in said agreements of September 20th 1880 and January 20th, 1881, the remaining twenty-five (25) per cent. of the said ten per cent. (10), being two and one-half per cent. commissions in bonds or money and capital stock of said Chicago, Portage & Superior Railway Company as pro-
66 vided in said contract of January 20th, 1881, that is to say, the said 2½ per cent. of said bonds and stock shall be placed under the control of the New York, New England and Western Investment Company before the giving of the credit of $10,000 hereinafter mentioned and shall become its absolute property *pro rata* as the other first-mortgage bonds of said railway company shall be by the trustee certified and issued and the payment of the said 25 per cent. of the said ten per cent. commissions in bonds or money or capital stock, when paid, shall be in full of all demands for commissions against the said Chicago, Portage & Superior Railway Company, and said Gaylord and Schofield.

And for and in consideration of the said twenty-five (25) per cent. of the ten per cent. (10) commissions herein reserved and provided to be paid to the said New York, New England and Western Investment Company, it agrees to give its favorable influence, ad-

vice and reference to and of and concerning said railway enterprise, and the said Gaylord and Schofield so far as their connection with and representation of the said railroad enterprise and company are concerned, and that the said railway company and its officers, and said Gaylord and Schofield, when representing said railway company may and ther are hereby authorized to refer to the said investment company, such persons as they may desire to have communicated with by and get information and advice from, said investment company in regard to the said railway company or said Gaylord or said Schofield, as representing said railway company;

And the said investment company hereby authorizes its officers and agents to aid and assist by advice, co-operation and counsel, the said Willis Gaylord and Wm. H. Schofield, whenever they may so require such assistance, co-operation or counsel, in any matters referring to the negotiation of the securities or contracts for materials, or for construction, or any material interests of the said Chicago, Portage & Superior Railway Company and that such assistance, co-operation and counsel shall be rendered and given by the said officers and agents of the said investment company, when so
67 required either in London, England (should such officers or agents or any of them happen to be there) or in New York city, in the State of New York, as the circumstances may require.

2. The said New York, New England and Western Investment Company, in further consideration for the said twenty-five (25) per cent. of the ten per cent. commissions aforesaid hereby agrees to place upon its own books, a credit to the said Chicago, Portage & Superior Railway Company of ten thousand dollars (10,000), to be expended by said railway company in paying, from time to time, the necessary expenses of the engineers now engaged in surveying and resurveying the line of railroad of said railway company and other necessary engineering outlays as they may occur, but for no other purpose, said money to be drawn in small amounts, from time to time as required, upon draft to be made by the president and countersigned by the secretary of said railway company, and made payable to the order of the chief engineer of said railway company in charge of such survey and resurvey (which chief engineer shall be a person approved by said investment company).

And the said parties hereto of the second, third and fourth parts, do hereby jointly and severally promise and agree, that the said sum of ten thousand dollars or so much thereof as shall be required for the purposes above mentioned, with interest thereon at the rate of six per cent. per annum from the dates of the several and respective drafts upon the same which may be paid, shall be refunded and repaid to the said New York, New England and Western Investment Company, out of the first proceeds of the sale of the first-mortgage bonds of the said railway company.

And the said ten thousand dollars ($10,000) and interest shall be so repaid and refunded to said investment company on or before the 15th day of December, A. D. 1881, and as collateral security for the repayment of said sum of ten thousand dollars and interest or of so much thereof as may be expended as hereinbefore agreed, the

said Chicago, Portage & Superior Railway Company hereby
68 agrees to cause the Farmers' Loan & Trust Company of New York, the trustee in the mortgage or deed of trust heretofore given to secure its first-mortgage bonds, and which are now in the hands of such trustee, to duly certify and issue to said investment company, forty of said first-mortgage bonds with all coupons thereunto annexed and in case of the repayment of said ten thousand dollars and interest, or so much thereof as may be so drawn as aforesaid, said forty bonds and annexed coupons shall be returned to said Farmers' Loan & Trust Company and become again subject to the trusts declared in said deed of trust; but in default of such repayment the said investment company may sell and dispose of said forty bonds, as provided by law in such cases, and after applying the proceeds, or so much thereof as may be necessary, to the payment of said credit of ten thousand dollars and interest or so much thereof as may be then in arrear, and after paying all the costs and expenses of so selling and disposing of said forty bonds, shall pay the surplus, if any, to the said trustee for the use and benefit of said railway company.

And said contracts of September 20th, 1880 and January 20th 1881 are hereby vacated and annulled in so far as they differ from or are inconsistent with the terms of these presents or with any part thereof.

This contract is not to be construed to affect the relations and rights established in and by said two contracts of September 20th 1880 and January 20th 1881, between the said Chicago, Portage and Superior Railway Company and said Willis Gaylord and said William H. Schofield.

In testimony of all which the New York, New England and Western Investment Company, has caused its corporate seal to be hereunto affixed, and its signature to be set by its vice-president to these presents and the same to be countersigned by its secretary.

And the Chicago, Portage and Superior Railway Company has caused its corporate seal to be hereunto affixed and its signa-
69 ture to be subscribed by its president to these presents, and the same to be countersigned by its secretary.

And the said Willis Gaylord and William H. Schofield have hereunto set their hands and seals.

Done at New York in quadruplicate, the day and year first above written.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY,
By GEORGE MOORE, *Vice-President.*
Attest: GEO. W. DEBERVOISE, *Secretary.*

CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY,
By WM. H. SCHOFIELD, *President.*
Attest: WILLIS GAYLORD, *Secretary.*

WILLIS GAYLORD.
WILLIAM H. SCHOFIELD.

70 "EXHIBIT G."

To the Farmers' Loan & Trust Company:

This is to certify that, for value received, Mr. John C. Barnes or bearer is entitled to have and receive — shares of the capital stock of the Chicago, Portage & Superior Railway Company, which stock has been fully paid for and placed in your keeping as a special trust for delivery upon this order, and you are hereby authorized and directed to accept or certify in the usual manner this order for the delivery of said stock, and to deliver to the bearer hereof — shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first-mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, or whenever and as often as any ten miles of the railroad of said railway company shall be built, as will be certified to by the president of said railway company, and in any event you are hereby directed to deliver to the bearer, on the first day of January, A. D. 1883, any of the said — shares of capital stock then remaining undelivered upon a surrender of this order therefor.

CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY,

[SEAL.] By —— ——, *President.*

[On the margin:] This order for the delivery of the bonds and stock of this company held in special trust is hereby approved and accepted.

THE FARMERS' LOAN AND TRUST COMPANY. [SEAL.]

71 EXHIBIT H.

This memorandum of agreement made and entered into this 16th day of June A. D. 1881, between the Chicago, Portage & Superior Railway Company party of the first part, and Joseph Hickson on behalf of himself and his associates, party of the second part,

Witnesseth as follows, viz:

Whereas the party of the first part is a corporation existing under and by virtue of the laws of the States of Illinois and Wisconsin, of the United States of America, and having for its object the construction and operation of a railroad from the city of Chicago, in said State of Illinois to Superior City and said State of Wisconsin, and

Whereas the party of the first part has not the money with which to construct such road, and desires to secure the services of the party of the second part, and his associates to obtain the same, and also desires their friendly advice and counsel from time to time in and about the work of laying out and constructing said road, and the matters and things connected therewith,

Now therefore, it is hereby agreed:

First. That the party of the second part and his associates will and shall aid the party of the first part, and its officers and agent in

borrowing a sum of money required for the purposes aforesaid, not exceeding in all eight million dollars by such recommendations, letters and influence as, in the judgment of the party of the second part, the fact and circumstances in respect to the pecuniary responsibility of the party of the first part and the character of its project aforesaid shall justly warrant; and further shall and will give to the said party of the first part their friendly advice and counsel, from time to time, in and about the work of laying out and constructing said railroad, and the matters and things connected therewith, and the future management of the business thereof.

72 Second. In consideration thereof, the party of the first part undertakes, promises and agrees to issue and deliver for said party of the second part, his associates, one-half of its entire capital stock, to wit: Five million dollars at the par value thereof, and which shall be fully paid and not subject to assessments; said stock to be so issued and delivered to J. B. Renton of London, England, in trust for the party of the second part and his associates, on or before the 15th of July next ensuing this date.

Third. And the party of the first part covenants that its entire capital stock is ten million dollars, and no more, and that the same shall not be increased beyond that amount, without the vote and consent thereto of the stock so as aforesaid to be issued and delivered in trust for the party of the second part and his associates.

In witness whereof, the said party of the first part has caused its name and seal to be hereunto affixed, pursuant to the resolution of its board of directors, and a certified copy of which is attached hereto; and the party of the second part has hereunto set its hand the day and year first above written.

CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY,
By WM. H. SCHOFIELD, *President.*

Attest: WILLIS GAYLORD, *Secretary.*

J. HICKSON.

Witness:
A. J. READ.

73 EXHIBIT I.

Memorandum of an agreement made this 15th day of July, in the year of our Lord one thousand eight hundred and eighty-one, between the Chicago, Portage & Superior Railway Company hereinafter called the "railway company" of the first part, and Sir Henry Whatley Tyler M. P. and Sir Charles Lawrence Young, baronet, both for this purpose of 21 Old Broad street, in the city of London, trustees for the company hereinafter mentioned to be incorporated under the provisions of the companies' acts of 1862, 1867 and 1877 and hereinafter called "the trustees" parties of the second part:

Whereas the "railway company" on the one part and Joseph Hickson as "trustee" for himself and his associates of the other part entered into an agreement dated June (16th) sixteenth, in the y-ar of our Lord one thousand eight hundred and eighty-one, whe-ein it

was agreed among other things that five million dollars (being one-half) of the paid-up capital stock of said railway company, should be placed under the control of said Joseph Hickson, in trust for his associates, for the purposes in such contract stated and it was stipulated that the said Joseph Hickson, and those to be associated with him would aid the said "railway company" in borrowing a sum of money as therein named and

Whereas the said Joseph Hickson acted on behalf of the "trustees" and the persons proposed to be incorporated as a company with limited liability as aforesaid and

Whereas for the purpose of more particularly defining the arrangements it is hereby further agreed as supplemental to the aforesaid agreement as follows to wit:

"The trustees" agree to organize and cause to be incorporated the Chicago, Portage & Superior Railway Company, Limited, "under the companies' acts of 1862, 1867 and 1877," and will cause such limited liability company to publish and issue a prospectus setting forth the advantages and value of said railway and solicit subscriptions from the public for debentures of said limited liability com-
74 pany, which debentures shall be exchangeable for the first-mortgage bonds of the railway company at such prices and upon such terms as to allotment &c., as shall be approved of by the president and secretary of the "railway company" in a contract to be hereafter made by the parties hereto, and in which contract it shall be provided that the bonds to be offered for sale by the "railway company," shall be by agreement placed under the joint control of Sir Henry Whatley Tyler M. P. and General William Henry Schofield, to be exchanged for such debentures as may have been allot-ed, issued and sold by said limited liability company; the bonds are to be delivered however at the price and for the purposes and considerations to be specified in said contract hereafter to be made by the parties hereto.

In compliance with the said Hickson agreement, and with these presents, upon the execution hereof, the said "railway company" shall and will deliver to "the trustees" a certificate of fifty-one thousand shares of one hundred dollars each, nominally, fully paid up, equal to five million one hundred thousand dollars, nomonal, being more than one-half of the whole capital stock of the "railway company" (and said amount of stock will, when earned as contemplated herein, within three calendar months from this date, give the holders thereof a preponderating vote in the meetings of the "railway company") and such certificate and the shares hereby represented shall be held in trust for the period of three calendar months from and after the date hereof and in case the proposed "limited liability company" shall succe-d in borrowing on behalf of the "railway company" a sum of money required by the railway company the amount whereof will be define- by the proposed contract upon such terms and in such amounts as will be specified in said contract to be hereafter made, then "the trustees" are to retain for the proposed "limited liability company" or as they may direct the said certificate and shares of capital stock thereby represented,

but in case of the failure of the proposed "limited liability company" to borrow the re*uq*ired amount of money and effect
75 allotment (in the amount and upon the terms to be agreed upon in said contract hereafter to be made) then at the expiration of the said three calendar months from the date hereof the said certificate for fifty-one thousand shares of the capital stock of said "railway company" without any charges thereon, shall be returned to General William Henry Schofield, president of the "railway company."

It is however, agreed by all the parties hereto that the "limited liability company" hereafter to be formed shall not publish and issue its prospectus until the affairs of the railway company are found to be satisfactory to "the trustees" on conclusion of the examination thereof, now being made under their direction by said Joseph Hickson.

And it is hereby expressly agreed that the said "proposed limited liability company" may, on obtaining the consent in writing of the said General Schofield, proceed to the allotment to the public (as per said contract hereafter to be made by the parties hereto) notwithstanding that only a portion of the money solicited shall be promised or subscribed for.

And, it is further agreed that all expenses incidental to the formation of "limited liability company," issue of its prospectus, raising money &c., shall, in all respects be borne by the company itself, and no part of the same is to be charged to the "railway company."

CHICAGO, PORTAGE & SUPERIOR
RAILWAY COMPANY.
By WILLIAM H. SCHOFIELD, *President.*
H. W. TYLER.
CHARLES L. YOUNG.

Attest: WILLIS GAYLORD, *Secretary.*

Signed by Sir Henry Whatley Tyler, M. P., and Sir Charles Lawrence Young in the presence of J. B. Renton, 21 Old Broad street, London.

76 EXHIBIT J.

Memorandum of agreement made this thirteenth day of September, one thousand eight hundred and eighty-one, between the Chicago, Portage & Superior Railway Company hereinafter called the "railway company" of the first part, William Henry Schofield, of New York, U. S. A., the president of the railway company, of the second part, Sir Henry Whatley Tyler, M. P. on behalf of himself and Sir Charles Lawrence Young, baronet, of the third part and the Chicago, and Grand Trunk Railway Company, Limited, hereinafter called the "limited company" of the fourth part.

Whereas by an agreement dated the sixteenth day of June last, made between the "railway company" and Joseph Hickson, and a further agreement dated the fifteenth day of July last, made between the "railway company" and the parties hereto of the third part, arrangements were made for obtaining for the "railway company" a sum of money required for the purpose of proceeding with the construction of the "railway company's" line, in consideration of which fifty-one thousand shares of one hundred dollars each, fully paid-up capital stock of the "railway company" were issued and delivered to the parties hereto of the third part, by whom the same are still held; and

Whereas instead on incorporating a company as provided by the last-mentioned agreement, for the purpose of soliciting subscriptions from the public on account of the "railway company" it has been agreed that the "limited company" should be entitled to the benefit of the before-mentioned agreements, and the "limited company" have accordingly prepared a prospectus, setting forth the advantages and value of the said railway, but they are unable to immediately issue the same to the public in consequence of the arrangements necessary for creating a first mortgage upon the undertaking of the "railway company" for the sum of ten millions two hundred thousand dollars as agreed upon not having yet been completed, and

Whereas, the "railway company" are under obligations to pay moneys to their contractor on account of the works executed
77 and to be executed in the construction of the line and for this purpose they require to borrow now the sum of fifty thousand dollars which the "limited company" have undertaken to procure upon the terms and subject to the conditions hereafter contained.

Now therefore, these presents witness, and it is hereby declared and agreed as follows:

1. The said "railway company" shall forthwith procure the existing mortgage upon their undertaking to be discharged and duly create a first mortgage for ten million two hundred thousand dollars upon the entire line of said "railway company" including particularly all the right and claim of the said "railway company" to the land grant, and will procure such mortgage to be duly recorded

so that the bonds intended to be secured thereby shall be a first charge, and will deposit the whole of said bonds with the exception of nine hundred and seventy-two thousand dollars, with parties in London, to be agreed upon between the "railway company" and the "limited company" which parties shall be authorized to deliver them up only upon the joint order of Sir Henry Whatley Tyler and the said William Henry Schofield or the president of the railway company and the "limited company" for the time being.

2. The said William Henry Schofield will forthwith proceed to America and take all steps that may be necessary to carry out the obligation of the "railway company" hereunder.

3. The "limited company" will advance or procure to be advanced to the "railway company," the sum of fifty thousand dollars upon the delivery to Joseph Hickson of one hundred thousand dollars of the first-mortgage bonds, at present existing upon the line to be held as security therefor, carrying interest from the date of advance at the rate of seven per cent. per annum, which sum shall be applied in discharging the obligations incurred or to be incurred in the construction of the railway. In case of the amount not being repaid on or before the expiration of six months from the
78 date of the issue of the prospectus herein provided for the "limited company" shall be entitled to realize the said bonds.

4. The amount of debentures of the "limited company" for which subscriptions shall be solicited, shall be the sum of five hundred thousand pounds or such other sum as shall be agreed upon between the parties hereto of the first and fourth parts, and the prospectus, solicitiong such subscriptions (the form of which has been approved by the "railway company" and the said William Henry Schofield) shall be issued with such additions and modifications as the "limited company" and the secretary of the "railway company" may consider necessary at such time within two months of this date, if the mortgage be then executed, as the market appears to the "limited company" favorable for obtaining subscriptions. The "limited company" shall be entitled to fix the price at which such debentures shall be issued, and the net proceeds of the said debentures, after deducting all costs and expenses of and attending the negotiations and issue shall be applied by the "limited company," in or towards payment of the cost of construction of the said railway, as contemplated by the prospectus. And the limited company or the trustees for the debenture holdres, shall be entitled to receive, upon the allotment of the debenture, an equivalent nominal amount to the said first-mortgage bonds to be deposited as aforesaid.

5. The said fifty-one thousand shares of capital stock shall be held by the parties hereto of the third part, in trust for the "limited company" to the intent that the "limited company" shall have and retain a preponderating vote in the meetings of the "railway company," provided that the preponderating vote herein referred to shall not be used to change the present directory of said railway company until one hundred miles of said railway shall have been constructed and put in operation.

6. The "limited company" shall be entitled to retain on account of themselves or their nominees the above amount of fifty
79 thousand dollars, and any further amounts they may advance with interest, at seven per cent. out of the subscription for debentures, such retainer being treated as a payment thereout on account of the "railway company."

7. The railway company and the parties of the third and fourth parts will do all acts and execute all agreements which may be necessary to carry out the stipulations affecting them contained in the said prospectus.

As witness the common seals of the companies hereto of the first and fourth parts and the hands of the other parties hereto.

CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY,
By WILLIAM HENRY SCHOFIELD,
President.
WILLIAM HENRY SCHOFIELD.

Attest: WILLIS GAYLORD, *Secretary.*

H. W. TYLER,
On Behalf of Myself and
SIR C. L. YOUNG, *Bart.*
CHICAGO & GRAND TRUNK RAILWAY COMPANY, LIMITED.
H. W. TYLER, *Chairman.*
J. B. RENTON, *Secretary.*

EXHIBIT K.

This agreement made this 10th day of January, A. D. 1882, between the Chicago St. Paul, Minneapolis & Omaha Railway Company, party of the first part, the Chicago, Milwaukee & St. Paul Railway Company, party of the second part, and the Chippewa Valley & Superior Railway Company, party of the third part, witnesseth:

That the party of the first part in consideration of the agreements of the parties of the second and third parts, hereinafter expressed, agrees:

First. That in case the said party of the first part shall obtain the land grant heretofore granted to the Chicago, Portage & Superior Railway Company in the State of Wisconsin, either by
80 grant of the legislature or negotiation with said Chicago, Portage & Superior Railway Company, or by both such grant and negotiation, the said party of the first part will give to the party of the third part one equal one-fourth part of the lands received under said grant.

Second. That it will grant to the party of the second part, all rights, franchises and property which it may obtain from the said

Chicago, Portage & Superior Railway Company, south of the junction of said road with the main line of the North Wisconsin railway, including all grade and right of way of said company between said junction and the city of Chicago, which the party of the first part may acquire.

Third. That it will make a contract of lease with the said party of the third part, giving said party of the third part, an equal right with the party of the first part to run its trains from Chippewa Falls, or if the party of the first part shall construct a road from Eau Claire to Chippewa Falls, then from Eau Claire by way of Chippewa Falls to Superior City upon the following terms: The party of the third part shall pay to the party of the first part six per cent. interest per annum upon one-half of the actual cost upon a cash basis of said railway, and shall also pay for repairs of the same upon the basis of wheelage. The option to take this agreement of lease shall remain to the party of the third part for the term of six months from the time the road is completed, so as to admit of the running of trains through from Chippewa Falls to Superior City.

Fourth. The party of the first part agrees that it will not extend its Neillsville line, and all the parties hereto agree that they will not extend their lines into the territory between Beaver on the Wisconsin Valley road, Neillsville on the Chicago, St. Paul Minneapolis & Omaha railway and Abbotsford, on the Wisconsin Central railroad a- Marshville on the Wis. Central railroad without further agreement between them.

81 In consideration of the above agreements the said parties of the second and third parts hereby agree that they will not make any effort to procure such lands to be granted to them or either of them, or aid or assist any other party to procure the same, except the party of the first part, and will render to the said party of the first part, all reasonable and proper assistance which they may be able to give in procuring said land grant to be given to the party of the first part by the legislature, and will aid said party of the first part, in any negotiations that it may set on foot with the said Chicago, Portage & Superior Railroad Company for the purpose of acquiring the same.

It is further agreed and understood that in case it shall become necessary to pay the said Chicago, Portage and Superior Railroad Company any money, in order to procure an assignment of its interests in said grant that the party of the third part, shall pay its proportion of said amount, being as one to three or relinquish all right to any portion of said grant.

It is further understood and agreed that the question of the amount of land pertaining to said grant and of the division thereof between said companies as above provided, shall be left to the determination of Philetus Sawyer and Alexander Mitchell, and that their decision upon that subject shall be final and conclusive between the parties.

In witness whereof, the parties to these presents have caused the same to be executed by their respective presidents and their corpo-

rate seals to be affixed hereto, attested by their respective secretarys, the day and year first above written.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
By H. H. PORTER, *President.*

[CORPORATE SEAL.]

Attest: C. W. HILLARD,
Ass't Sec'y.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By ALEX. MITCHELL, *P't.*

[CORPORATE SEAL.]

Attest: P. M. MYERS, *Sec'y.*

82 CHIPPEWA VALLEY & SUPERIOR RAILWAY COMPANY,
By J. C. EASTON, *P't.*

[CORPORATE SEAL.]

Attest: A. J. EASTON, *Sec'y.*

83 "EXHIBIT L."

This agreement made and entered into this twentieth day of January, A. D. 1882, by and between A. A. Jackson of Janesville, Wisconsin, C. J. Barnes of Chicago, Illinois, and John C. Barnes of the city of New York, in the State of New York, by A. A. Jackson and C. J. Barnes his agents, parties of the first part, and R. R. Cable of the city of Rock Island, in the State of Illinois, party of the second part, witnesseth:

1st. The parties of the first part hereby agree with the party of the second part to sell to said party of the second part for the sum hereinafter mentioned, to be paid as hereinafter stated, ten thousand shares of the full-paid capital stock of the Chicago, Portage & Superior Railway Company standing on the books of said company in the name of A. A. Jackson, and so much of the ten thousand shares of the capital stock standing in the name of John C. Barnes aforesaid, on the books of said company (which last-named stock said Jackson and C. J. Barnes, as agents of said John C. Barnes, are authorized and empowered to sell upon such terms as they shall see fit, a copy of the said authority from said John C. Barnes, to said A. A. Jackson being hereto annexed and made a part hereof) as is absolutely valid and full-paid stock; and the said C. J. Barnes agrees to sell to said party of the second part two hundred and fifty shares of stock owned by said C. J. Barnes two hundred shares thereof standing in the name of George E. White, and fifty shares thereof standing in the name of William R. Chadsey, all of said shares representing full-paid stock, and being by said parties properly assigned to said C. J. Barnes, and in addition all the valid

full-paid capital stock of said company which the said Barnes can acquire or control without purchasing the same, which stock, so to be transferred under the provisions hereof, shall constitute a majority of the valid outstanding full-paid capital stock of said railway company.

2nd. And the said parties of the first part hereby agree to deposit contemporaneously with the execution hereof with L. J. Gage cashier of the First National Bank of Chicago to be held by him and
84 his successors in office, in trust, subject to the provisions hereof, the certificates representing the ten thousand shares of full-paid capital stock so standing in the name of said Jackson, and the certificates representing the two hundred and fifty shares of said stock so owned by said C. J. Barnes, with assignments thereof in due form and properly executed, transferring said stocks to said Cable, or to such other person or persons as he shall direct at the execution hereof, and to deliver to said Gage, at the same time, an assignment properly executed by said Jackson and said C. J. Barnes as agents of said John C. Barnes, of so much of the said ten thousand shares of said stock so standing in the name of said John C. Barnes as is and shall be found to be legally issued and full-paid stock.

3rd. And the said C. J. Barnes hereby agrees to use his best endeavors to procure and deliver to said Gage, or his successors in office, properly assigned to said Cable, as speedily as possible, a certificate or certificates representing so much of said ten thousand shares of stock so standing in the name of said John C. Barnes as is and shall be found to be legally issued and full-paid stock with proper assignments thereof (the said certificates now being in Europe). And the said C. J. Barnes hereby further agrees to use his best efforts to procure to be delivered to said Gage or his suecessors in office, the notes heretofore executed by said railway company to A. S. Barnes trustee, aggregating sixty-seven thousand dollars and falling due July first, A. D. 1882 endorsed without recourse by the holders thereof to said R. R. Cable, with assignments to said Cable by the holders of said notes of all agreements, trust, instruments &c. setting apart and pledging to and for said holders as security for said notes, two million, five hundred thousand dollars of first-mortgage bonds of said railway company, now held in trust by A. S. Barnes of the city of New York, and under an agreement between said Barnes and the Farmers' Loan & Trust Company of said city, said assignments to be sufficient in law to place said Cable as to said
85 bonds and security, in the same position as the holders of said notes are in. And the said C. J. Barnes further agrees to use his best efforts to secure the return to said railway company and the cancellation thereof of the bonds issued to him as a bonus for securing said loan (represented by said notes) to said railway company, or to procure said bonds and deposit the same with said Gage, or his successors in office (said notes being a portion of the notes to the amount of one hundred thousand dollars executed by said railway company to said A. S. Barnes and which have been negotiated only to the extent of said fifty-seven thousand dollars).

And the party of the second part in consideration of the promises, agrees to purchase the said stock and notes and said collaterals thereto upon the conditions hereinafter set forth, for the sum of two hundred thousand dollars, and contemporaneously herewith to execute and deliver his, the said second party's certified checks, or to procure and deliver to said Gage certificates of deposit as follows:

One for thirty-one thousand five hundred dollars, payable to said A. A. Jackson or order, one for eighty-four thousand two hundred and fifty dollars, payable to said C. J. Barnes or order, and one for eighty-four thousand two hundred and fifty dollars, payable to said C. J. Barnes or order; the said C. J. Barnes representing as to said last-two mentioned checks or certificates of deposit himself and said John C. Barnes; the said certified checks or certificates of deposit to be held by said Gage or his successors in office as hereinafter set forth.

It is hereby mutually agreed that whenever a certificate signed by I. C. Sloan and John C. Spooner shall be represented to said L. J. Gage or his successor for the time being as cashier of said bank, stating that the legislature of Wisconsin has at its present session enacted a law annulling and resuming a grant made by chapter 126 of the laws of said State for the year 1874, to the Chicago and Northern Pacific Air Line Railway Company and conferring said grant upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company or upon any other company which shall be satisfactory to said Chicago, St. Paul, Minneapolis & Omaha Railway
86 Company, then and thereupon said Gage or his successor in office shall deliver to said Jackson the said check or certificate of deposit payable to him as aforesaid, for the said sum of thirty-one thousand and five hundred dollars, and to said C. J. Barnes the said check or certificate of deposit payable to him as aforesaid for the sum of eighty-four thousand two hundred and fifty dollars and shall at the same time deliver to said Cable or to whomsoever he shall direct, the said ten thousand shares of full-paid stock so standing in the name of said Jackson and the said two hund-ed and fifty shares of full-paid stock so owned by said C. J. Barnes, and the assignments thereof as afore said, and the assignment of so much of the stock so standing in the name of said John C. Barnes at is legally issued and full-paid stock of said company, and the certificates representing the same, if the same shall have meanwhile been deposited with said Gage

Provided however and it is hereby agreed that the said Cable may at his option direct the said Gage or his successor in office to deliver to said Jackson and Barnes said certified checks or certificates of deposit first named above, aggregating one hundred and fifteen thousand seven hundred and fifty dollars, before the passage of the act conferring the land grant upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company or such other company (of the exercies of which option he shall give imm-diate notice to said Jackson and Barnes) and upon such direction being given to said Gage or his said successor, and upon satisfactory proof to said Gage or his said successor that notice has been given by said Cable

to said Jackson and Barnes of the exercise of such option, the said Gage or his successor shall deliver to said Cable or whomsoever he shall direct the said stock and assignment.

And the said John C. Barnes further hereby agrees with said Cable to use his best efforts to procure the surrender to said railway company, and the cancellation thereof of all the said cert-fi*i*cates representing the said ten thousand shares of the capital stock so stan-ing in his name, and the reissue to him, the said John
87 C. Barnes, of the certificates in lieu thereof representing so much of the said ten thousand shares so surrendered and to be cancelled as shall have been valid full-paid stock, and will assign such newly issued certificates representing said full-paid stock to said Cable and deposit the same with said Gage or his successors in office; it being the intention hereof that none of said stock except legally issued and full-paid stock shall be delivered to said Gage, or accepted by said Cable under the provisions hereof.

And the said Barnes hereby further agrees that until the surrender for cancellation of said ten thousand shares of capital stock as aforesaid, so now standing in his name as aforesaid, and until the reissue to him of certificates for so much thereof as represents valid full-paid stock, he will not sell, assign or transfer the said ten thousand shares or (of?) capital stock so now standing in his name or any portion thereof to any person or persons, or give any power, authority or proxy to any person or persons to use or vote the same.

And whenever the said C. J. Barnes or John C. Barnes shall have delivered to said Gage or his successor in office, under the provisions hereof, a majority of the actual, valid full-paid outstanding capital stock of said railway company, upon which the said Cable or his assigns shall have obtained the actual control and possession of said railway company, its franchises and property, and said notes, and said assignments by the holders thereof, transferring to said Cable and his assigns all the interest of said hold*r*es in said two million five hundred thousand dollars of bonds so set apart and pledged as collateral to said notes, and all the rights of said hold*r*es of said bonds, and all their remedies in relation thereto, and the said bonds so delivered to said C. J. Barnes as bonus aforesaid or proper evidence of the cancellation thereof, and the said new certificates issued to said John C. Barnes for full-paid stock as aforesaid, if he shall be able to procure the same or proper evidence of the surrender and cancellation of said ten thousand shares of the capital stock
88 so standing in his name if he shall be able to procure the surrender and cancellation thereof, or whenever the said Cable or his assigns shall have obtained the actual control and possession of said company, its franchises and property, by means of bonds furnished by said Barnes under the provisions hereof, then the said Gage or his successors as aforesaid, shall deliver to said Barnes or whomsoever he shall direct the said certified check or certificate of deposit for said eighty-four thous*n*ad two hundred and fifty dollars last above named, and shall deliver to said Cable, or to whomsoever he shall direct the said notes and all collaterals thereto

in possession of said Gage or his successors, and all bonds and papers of every name and nature which the said John C. Barnes or C. J. Barnes shall meanwhile have deposited with said Gage or his successor, and which under the provisions hereof the said party of the second part has agreed to accept.

Provided further that if the said Barnes shall be unable to procure said notes or any thereof to be assigned to said Cable as aforesaid, the said Gage or his successor in office shall, when the said Cable or his assigns shall have obtained, by means of said stock, or by means of any bonds procured under the provisions hereof by said bonds, the actual control and possession of said railway company, its franchises and property, deliver to said Barnes, or to whomsoever he shall direct, a sum of money out of said certified check or certificate of deposit for eighty-four thousand two hundred and fifty dollars as aforesaid, which shall remain after deducting therefrom the principal and accrued interest of such of said notes as the said Barnes shall have been unable to procure and deliver as aforesaid.

The foregoing being conditioned upon the passage by the legislature of the State of Wisconsin, at its present session of an act annulling and resuming said grant and conferring the same upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company, or such other company as aforesaid, the said Cable hereby agrees with said Jackson that if said legislature shall fail to pass said act
89 that he, said Cable will purchase of said Jackson, the said ten thousand shares of stock so standing in his name as aforesaid, and so to be delivered to said Gage, properly assigned as aforesaid, for the sum of thirty-one thousand five hundred dollars and the said Jackson hereby agrees with said Cable to sell to him, the said Cable, or to whomsoever he shall direct, and to properly assign and transfer the same, the said ten thousand shares of stock for the said sum of thirty-one thousand five hundred dollars.

And the said Cable hereby agrees with the said C. J. Barnes representing himself and the said John C. Barnes, as aforesaid that if said act should fail to pass said legislature, as aforesaid, he will purchase of said Barnes, the said two hundred and fifty shares of stock so owned by said C. J. Barnes as aforesaid, and so much of said ten thousand shares of stock so standing in the name of John C. Barnes as aforesaid as shall represent legally issued and full paid stock, and the said notes if procured by said C. J. Barnes with the collaterals thereto, and the assignments of said collaterals and all interests therein, as hereinbefore set forth, for the sum of eighty-four thousand two hundred and fifty dollars, and the said C. J. Barnes for himself and for said John C. Barnes, hereby agree to sell to said Cable the said two hundred and fifty shares, and so much of said ten thousand shares as shall represent legally issued and full-paid stock, and the said notes, if procured, with the collaterals and assignments as aforesaid, for the sum of eighty-four thousand two hundred and fifty dollars.

And the said Cable hereby further agrees with the said C. J. Barnes, that he will purchase of said C. J. Barnes representing himself and said John C. Barnes, as aforesaid, if said act shall fail to

pass the legislature as aforesaid and if said Barnes shall be unable to procure the said notes and collaterals as aforesaid, or any part thereof, so much of said ten thousand shares so standing in the name of said John C. Barnes, and owned by him as aforesaid, as shall represent legally issued and full paid stock, and said two hundred and fifty shares of stock so owned by said C. J. Barnes,
90 for the sum of seventeen thousand two hundred and fifty dollars, and in addition thereto for such of said notes and collaterals and assignments as the said Barnes shall be able to procure, for the actual cost thereof, not exceeding face and accrued interest, and the said C. J. Barnes for himself and said John C. Barnes, agrees hereby to sell and transfer to said Cable in such event the said stock and said notes for the sum hereinbefore last set forth.

Provided however, and it is hereby agreed that the said Cable may at his option, if he shall be in doubt as to whether any of said stock so to be furnished by said John C. Barnes or C. J. Barnes is legally issued and full-paid stock, have the right to decline to accept the same under the provisions hereof, but shall pay, however, in the event of such declination, the same amount or amounts which he would under the provisions hereof be obliged to pay had he accepted such stock. And in the event of such declination by said Cable, to accept said stock, the stock which he so declines to accept shall be surrendered by the said John C. and C. J. Barnes to the said railway company for cancellation.

In witness whereof the parties hereto have hereunto set their hands and seals this 20th day of January, A. D. 1882.

This agreement is executed in duplicate.

(Signed) A. A. JACKSON. [SEAL.]
C. J. BARNES. [SEAL.]
J. C. BARNES. [SEAL.]
By A. A. JACKSON AND
C. J. BARNES, *Agents.*
R. R. CABLE. [SEAL.]

Signed, sealed, and delivered in presence of—
J. C. SPOONER.
C. W. HILLARD.

91 Whereupon a subpœna duly issued as follows:

92 THE UNITED STATES OF AMERICA, } 88:
Western District of Wisconsin, }

The President of the United States of America to the Chicago, Portage and Superior Railway Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the Farmers' Loan and Trust Company, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the western district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of July next ensuing, at Madison, to answer to a bill of complaint exhibited against you

in our said court by Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased.

And to do further and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said The Chicago, Portage and Superior Railway Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the Farmers' Loan and Trust Company, if to be found in his district, and due return thereof make.

Witness the Honorable Samuel F. Miller, associate justice [SEAL.] of the Supreme Court of the United States, at the city of Madison, in the said district, this 23 day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and twelfth.

F. M. STEWART, *Clerk.*

LAMB & JONES,
Complainant's Solicitors.
EWING & SOUTHARD AND
J. R. DOOLITTLE,
Of Counsel.

It is ordered by our said court that the said The Chicago, Portage and Superior Railway Company, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, The Farmers' Loan and Trust Company, the defendant- aforesaid, do enter their appearance in this suit in the clerk's office on or before the day and time at which this subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

93 Subpœna returned served as follows:

I certify and return that I served the within chancery subpœna on the within-named Chicago, St. Paul, Minneapolis and Omaha Railway Company this 9th day of June, A. D. 1888, at Hudson, Wisconsin, by showing the same to E. E. Woodman, secretary of said railway company, and delivering to him a true copy thereof.

D. C. FULTON,
U. S. Marshal,
By EMIL OLUND, *Deputy.*

94 Afterwards, to wit, on the 2d day of July, 1888, came the defendant The Chicago, St. Paul, Minneapolis & Omaha Railway Company, by Pinney & Sanborn, its solicitors, and filed notice of appearance as follows:

Notice of Appearance.

Circuit Court of United States for Western District of Wisconsin.
In Equity.

SARAH R. ANGLE, as Administrator of Horatio G. Angle, Deceased,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY Company, Impleaded with The Farmers' Loan and Trust Company *et al.*

The clerk of said court will enter the appearance of the defendant The Chicago, St. Paul, Minneapolis & Omaha Railway Company herein by Pinney and Sanborn, its solicitors.

Dated July 2, 1888.

PINNEY & SANBORN,
Solicitors for Chicago, St. Paul, Minneapolis & Omaha R'y Company.

To Frank M. Stewart, Esq., clerk.

Afterwards, to wit, on the 28th day of July, 1888, came the
95 defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company, by its solicitors, Pinney and Sanborn, and filed its demurrer to the complainant's said bill of complaint as follows:

Demurrer.

Circuit Court of the United States for the Western District of Wisconsin. In Equity.

The demurrer of The Chicago, St. Paul, Minneapolis and Omaha Railway Company *to* one of the defendants, to the bill of complaint of Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer shows that the said complainant hath not in and by her said bill made or stated such a cause as doth or ought to entitle her to any such discovery or relief as is thereby sought and prayed for from and against this defendant or any discovery or relief whatever.

96 Wherefor-, and for divers other errors and imperfections, this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

PINNEY & SANBORN,
Def'ts' Sol'rs.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

S. W. PINNEY,
Of Counsel for Def't.

DISTRICT OF MINNESOTA, *ss:*

Edwin E. Woodman, secretary of the defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company, being duly sworn, says that the foregoing demurrer is not interposed for delay, and further saith not.

EDWIN E. WOODMAN.

Subscribed and sworn to before me this 27th day of July, A. D. 1888.

B. J. SHIPMAN,
Master in Chancery, District Minnesota.

97 Afterwards, to wit, on the 18th day of July, 1889, came said defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, by its solicitors, Pinney and Sanborn, and filed notice of application for signing & entry of decree as follows:

Circuit Court of the United States for the Western District of Wisconsin.

SARAH R. ANGLE, Administratrix, &c., *vs.* CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILway Company, Impleaded with The Chicago, Portage & Superior Railway Company *et al.*	In Equity.

GENTLEMEN: Take notice that at ten o'clock in the forenoon on the 20th day of July instant application will be made to the said court, at the United States court-room in the city of Madison, to sign & enter the final decree in this cause in accordance with the opinion of Mr. Justice Harlan on file herein, a copy of which said proposed decree has been heretofore furnished you.

Yours, &c., PINNEY & SANBORN,
Sol'rs for Defendant.

To Messrs. Lamb & Jones & J. R. Doolittle, sol'rs for complainant.

98 On this day, to wit, the second day of September, A. D. 1889, in the June term of said court, A. D. 1889, in the record of the proceedings thereof in said entitled cause is the following entry:

Decree.

Circuit Court of the United States for the Western District of Wisconsin.

SARAH R. ANGLE, as Administratrix of the Estate of Horatio G. Angle, Deceased,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA Railway Company, Impleaded with The Chicago, Portage and Superior Railway Company and The Farmers' Loan & Trust Company. } In Equity.

The demurrer of the defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company to the complainant's bill of complaint having been argued by Mr. Pinney, of counsel for said defendant, and Mr. Doolittle, of counsel for the complainant, before his honor Mr. Justice Harlan, whose opinion thereon is on file herein, and the court being now fully advised of and concerning its
99 opinion on said demurrer, it is ordered, adjudged, and decreed that the said demurrer be, and the same is hereby, sustained, and that the said bill of complaint be, and the same is hereby, dismissed as to the defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company and the land-grant lands mentioned in said bill and all the proceeds of the same for want of equity; and it is further ordered, adjudged, and decreed that the said defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, recover against the said complainant its costs and charges in and about its defense herein, to be taxed and entered upon the foot of this decree.

JOHN M. HARLAN,
September 21, 1889. *Justice Supreme Court U. S.*

The costs of the defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company taxed and allowed at the sum of one hundred and twenty-six dollars and entered hereon.

F. M. STEWART, *Clerk.*

100 Afterwards, to wit, on the 11th day of September, 1889, came the complainant, by her solicitors, Lamb & Jones, & made and filed application for appeal to the Supreme Court of the United States as follows:

In Circuit Court of the United States for the Western District of Wisconsin.

SARAH R. ANGLE, Administratrix of the Estate of H. G. Angle, Deceased,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY Company, Impleaded with The Chicago, Portage & Superior Railway Company *et al.*

And now comes the said complainant, Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, and prays an

appeal to the Supreme Court of the United States from the final decree rendered herein on the second day of September, 1889, in favor of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant, dismissing the complainant's bill herein for want of equity as against said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and for costs, and she prays the court by its order in the premises to fix the amount of the bond or under-
101 taking to be given by her on said appeal, and for such other or further relief or order in the premises as may be just.

LAMB & JONES,
Sol'rs for Complainant.

Sept. 11, 1889.

On this day, to wit, the 11th day of September, in the June term, A. D. 1889, of said court, in the record of the proceedings thereof in said entitled cause is the following entry:

Order Granting Appeal.

In Circuit Court of the United States for the Western District of Wisconsin.

SARAH R. ANGLE, Administratrix of the Estate of H. G. Angle, Deceased,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA Railway Company, Impleaded with The Chicago Portage and Superior Railway Company *et al.*
} In Equity.

On the application and the record in the above-entitled case and on motion of Lamb & Jones, solicitors for complainant, solicitors for said defendant, the Chicago, St. Paul, Minneapolis & Omaha
102 Railway Company, present,—

Ordered, that said application for appeal be, and the same hereby —, allowed from the final decree signed on the 2d day of September, 1889, in favor of said Chicago, St. Paul, Minneapolis and Omaha Railway Company, dismissing said complaint and adjudging costs in favor of said Chicago, St. Paul, Minneapolis and Omaha Railway Company against said complainant, to the Supreme Court of the United States, and the court hereby fixes the amount of the bond to be given by said complainant on said appeal at the sum of four hundred dollars, conditioned as required by law; to be effectual as a supersedeas, that said appeal be perfected on the filing of such bond, approved as required by law.

By the court:

R. BUNN, *Judge.*

Sept. 11, 1889.

Bond for supersedeas filed as follows:

Appeal Bond.

103 Supreme Court of the United States.

SARAH R. ANGLE, Administratrix of the Estate of Horatio G. Angle, Deceased, Complainant & Appellant,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY Company, Defendant & Respondent, Impleaded with The Chicago, Portage & Superior Railway Company and The Farmers' Loan & Trust Company.

Know all men by these presents that we, Frank W. Hoyt & George Bunker, residents of the city of Madison, Dane county, Wisconsin, are held and firmly bound unto the Chicago, St. Paul, Minneapolis & Omaha Railway Company, of Wisconsin, in the sum of four hundred dollars, to be paid to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 10 day of January, A. D. 1890.

Whereas the above named Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, hath taken an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled action by the circuit court of the United States for the western district of Wisconsin on the 2nd day of September, A. D. 1889, dismissing complainant's bill and awarding costs to said Chicago, St. Paul, Minneapolis & Omaha Rail-
104 way Company against complainant in the sum of $126.00, one hundred and twenty-six dollars, and said complainant having duly prayed an appeal to the Supreme Court of the United States which was allowed by said court, which fixed by the order the bond to be given to stay proceedings at the sum of four hundred dollars, conditioned as required by law, and that said appeal be perfected on the filing of such bond, approved as required by law:

105 Now, therefore, the condition of this obligation is such that if the above-named Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, shall prosecute her said appeal to effect and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

FRANK W. HOYT. [SEAL.]
GEORGE BUNKER. [SEAL.]

Signed, sealed, and delivered in presence of—
F. J. LAMB.
EDWIN C. MASON.

STATE OF WISCONSIN, } ss:
Western District of Wisconsin, Dane County, }

Frank W. Hoyt & George Bunker, each of Madison, Dane county, Wisconsin, being each duly sworn, each for himself says he is a resident and freeholder in said State of Wisconsin; that he is worth the sum of eight hundred dollars in property in Wisconsin over and above all exemptions and liabilities, and that he executed the foregoing bond for the uses and purposes therein expressed.

FRANK W. HOYT.
GEORGE BUNKER.

Subscribed and sworn to before me this 10th day of January, A. D. 1890.

F. J. LAMB,
Notary Public, Dane Co., Wis.

106 [Endorsed:] U. S. circuit court, western dist. Wis. Sarah R. Engle, administratrix, compl't, *vs.* The Chicago, St. Paul, Minneapolis & Omaha R'y Co. *et al.*, def'ts. Copy. Bond on appeal. The within bond is hereby approved both as to form & sufficiency. Dated January 29, 1890. R. Bunn, dist. judge. Lamb & Jones, solicitors for compl't.

Endorsed: The within bond is hereby approved as to form and sufficiency. Dated Jan'y 29, 1890. R. Bunn, district judge. Filed Jan'y 29, 1890, and citation issued.

107 On this day, to wit, the 29th day of January, A. D. 1890, came the complainant, by her solicitors, and filed an appeal by complainant as follows:

108 Circuit Court of the United States, Western District of Wisconsin.

SARAH R. ANGLE, Administratrix of the Estate of Horatio G. Angle, Deceased, Complainant,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Impleaded with The Chicago, Portage & Superior Railway Company and The Farmers' Loan and Trust Company, Defendants.

To the honorable the Supreme Court of the United States:

The appeal of Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, the above-named complainant and appellant, respectfully showeth—

That upon the 23d day of May, A. D. 1888, the above-named complainant filed her bill in the circuit court of the United States for the western district of Wisconsin against the above-named defendants, which bill alleged the due appointment of said complainant as administratrix of the estate of Horatio G. Angle, deceased, her citizenship in Illinois and that of defendants in Wisconsin, the recovery in said circuit court of a judgment in an action at law in

her favor as such administratrix against the said Chicago, Portage & Superior Railway Company for the sum of two hundred & five thousand two hundred & twenty & $\frac{50}{100}$ dollars ($205,220.50), the issue of execution to enforce said judgment, the due return of said execution *nulla bona* before the commencement of this action, the
109 necessary facts entitling the complain-t to file such bill of complaint against said defendants, and that by the fraud and wrongful acts and doings of said Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant herein, it had obtained and held a large amount of property, worth more than two millions of dollars, which in equity and good conscience ought to be applied in payment of said judgment, and showing that said Chicago, St. Paul, Minneapolis & Omaha Railway Company was chargeable as trustee and, as such, with holding said property, worth more than two millions of dollars, in trust for the benefit of said complainant, and that it should be applied in payment of said judgment.

That to said bill of complaint the said Chicago, St. Paul, Minneapolis & Omaha Railway Company interposed a general demurrer that said complainant had not stated facts sufficient in said bill to entitle her to any relief in said cause; that no service of process was obtained against said Chicago, Portage & Superior Railway Company nor on said Farmers' Loan & Trust Company; that on the 2d day of September, A. D. 1889, a final decree was made and pronounced in this cause, wherein it was in substance adjudged and decreed that said demurrer be sustained and ordering and decreeing that said bill of complaint be dismissed as to said Chicago, St. Paul, Minneapolis & Omaha Railway Company with costs, and further ordering, adjudging, and decreeing that said defendant, The Chicago,
St. Paul, Minneapolis & Omaha Railway Company, recover
110 costs against said complainant, afterwards taxed at the sum of — dollars.

Wherefore this appellant appeals from the whole of said decree of the said circuit court of the United States and respectfully prays that the decree of the said circuit court and the bill and demurrer in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made herein in accordance with the prayer of said bill of complaint, with costs, or for such other decree as to the said Supreme Court shall seem to be just.

LAMB & JONES,
Solicitors for Complainant.

EWING & SOUTHARD,
JAMES R. DOOLITTLE,
Of Counsel.

111 [Endorsed:] U. S. circuit court, western dist. Wis. Sarah R. Angle, administratrix, comp., agt. The Chicago, St. Paul, Minneapolis & Omaha Railway Company *et al.*, def'ts. Copy. Appeal by complainant. Lamb & Jones, solicitors for comp.

112 *Certificate to Transcript.*

UNITED STATES OF AMERICA, *Western District of Wisconsin,* } ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original records and proceedings in said cause now remaining on file and of record in my office, and that the same is a true transcript therefrom and also a true copy of the bond on appeal in the said case.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, at my office, in the city of Madison, in said district, this 6th day of February, A. D. 1890, and of the Independence of the United States the one hundred and fourteenth.

F. M. STEWART,
Clerk of the Circuit Court, Western District of Wis.

113 United States Circuit Court, Seventh Circuit, Western District of Wisconsin.

SARAH R. ANGLE, Administratrix of the Estate of Horatio G. Angle, Deceased, Complainant & Appellant,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY Company, Impleaded with Others, Respondent.

By the Honorable R. Bunn, one of the judges of the circuit court of the United States for the western district of Wisconsin, to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, appellee:

Whereas Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, has appealed to the Supreme Court of the United States from a decree lately entered in the circuit court of the United States for the western district of Wisconsin, made in favor of you, the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, and has filed the security required by law, you are therefore hereby cited to appear before the Supreme Court, at the city
114 of Washington, on the second Monday of October next, being the 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Madison, in the western district of Wisconsin, this 29th day of January, 1890.

R. BUNN,
Dist. Judge.

Service of the foregoing citation hereby admitted.

PINNEY & SANBORN,
Sol'rs for Def't, Omaha Co.

[Endorsed:] Circuit court U. S., seventh circuit, west. dist. Wis. Sarah R. Angle, adm'x, applt., *v.* The Chicago, St. Paul, Minneapolis & Omaha R'y Co., resp't. Citation.

115 Circuit Court of the United States, Western District of Wisconsin.

SARAH R. ANGLE, Administratrix of Horatio G. Angle, Deceased,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, &c. } In Equity.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff recovered in this court, January 31, 1887, a judgment against the Chicago, Portage and Superior Railway Company for the sum of $205,883.19, damages & costs. Execution having been issued and returned unsatisfied, this suit was instituted for the purpose of reaching and subjecting to the satisfaction of that judgment the same lands as are in controversy in the suit in this court, just determined, of the Farmers' Loan and Trust Company, trustee, *vs.* Chicago, St. Paul, Minneapolis and Omaha Railway Company, &c., and all notes, bonds, or moneys arising from sales, rents, stumpages, license, charges, or proceeds of sale of such lands in the hands either of the corporation last above named or of the judgment debtor. The allegations of the present bill are substantially the same as in the bill filed in the other suit. For the reasons stated in the opinion delivered in the suit brought by the Famers' Loan & Trust Company, the court holds that the Chicago, Portage and Superior
116 Railway Company has no interest in said lands which can be subjected in satisfaction of the above judgment against it.

The demurrer is sustained and the bill must be dismissed with costs to the defendants.

It is so ordered.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of said court, do hereby certify that the foregoing is a true copy of the opinion of the court, delivered by Mr. Justice Harlan, in within-entitled cause on file in said court.

Witness my hand and seal of said court this 12th day of Feb'y, A. D. 1890.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

[Endorsed:] Sup. Court U. S. 1890, Oct'r term. No. 1114. Sarah R. Angle, adm'x, &c., app't, *vs.* The Chicago, St. Paul, Minneapolis & Omaha R. R. Co. Certified copy of opinion of circuit court.

[Stamped:] Office Supreme Court U. S. Filed Jun- 23, 1890. James H. McKenney, clerk.

Endorsed on cover: Case No. 13,968. W. Wisconsin C. C. U. S. No. 310. Sarah R. Angle, administratrix of the estate of Horatio G. Angle, deceased, appellant, *vs.* The Chicago, St. Paul, Minneapolis & Omaha Railway Company. Filed February 17, 1890.

UNITED STATES OF AMERICA,
Northern District of Illinois.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Western District of Wisconsin.

ANGLE,

vs.

CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY.

Decision by Hon. John M. Harlan,

MONDAY, *June 20th*, 1887.

THE COURT: I sat with the Circuit Judge in hearing the question of a new trial in the case of *Angle* vs. *The Chicago, Portage & Superior Railway Company.* That is a suit by Angle upon a railroad construction contract, in which there was a verdict by the jury in favor of the plaintiff for the sum of $351,000. A new trial was asked by the railway company upon various grounds. The first ground is that under the evidence in the cause the court might very well have peremptorily instructed the jury that the contract in suit was fraudulent and void, because the officers of the railway company who made it were interested with the contractor in the profits

that were to be derived from the work. There was no such instruction asked on the part of the defendant, but the case is put in that way by counsel for the railway company, in order to re-inforce the proposition which they make, that, according to the uncontroverted evidence in the case, the officers of the company were interested with the contractor, and that therefore the instructions which the court gave upon that subject were more liberal to the plaintiff than they ought to have been.

It is quite clear from the evidence that the fact as to whether the officers of the Company were interested with the railroad contractor in the profits of the contract, was one seriously controverted. There is an absolute conflict between several of the witnesses; between those who we would expect, ordinarily, would be able to speak definitely upon the subject. The case therefore came within the rule well established by the Supreme Court of the United States, that a case should never be withdrawn from the jury upon a question of fact, unless the evidence is so overwhelmingly on the one side or the other as to leave no doubt as to the result. The court, therefore, very properly left the question to the jury to determine whether the officers were interested with the contract in the profits to be derived from the work.

I have carefully examined the charge given by the Circuit Judge upon that and other questions in the case, and am of the opinion that the charge contains no error. The only ground entitled, it seems to me, to consideration, on that branch of the case, is the objection made to the sentence in the charge of the court in which the phrase "clear preponderance of

testimony" is found. The court said: "It is sufficient to render the contract invalid, that Schofield and Gaylord, or either of them, as stockholders and officers of the company, secured an agreement with the contractor to profit personally, at the expense of the company. You must not forget, however, that the burden is upon the defendant to show by a clear preponderance of the evidence, that the contract was fraudulent."

Counsel for the company seize upon the use of the word "clear" in that connection, and argue that the jury were required to find more than the law required them to find, in order to come to the conclusion that the contract was fraudulent; but that sentence is to be taken in connection with what follows: "The law," the court proceeded, "indulges in no presumption against the good faith of the officers of the company, or against the validity of the contract. On the contrary, the presumption is that the officers acted honestly, and that the contract is free from fraud; and unless upon a fair consideration of all the evidence you think there is a preponderance in support of the charge of fraud, you will sustain the contract. Nothing short of an agreement or an understanding that Schofield and Gaylord, or one of them, was to have a share in the profits of the contract, is sufficient to render it invalid. Mere talk of such an agreement or understanding would not render the contract void if the parties really came to no understanding or agreement."

Taking all these sentences together the jury could not have understood the court to mean more than that which the court had a right to say; that before imputing fraud to any one the evidence must be of

such a character as to satisfy the jury, reasonably, that such was the fact. The words "clear preponderance of testimony" in the connection in which they are used, mean no more than a preponderance of testimony. I do not think, therefore, that error can be laid against that part of the charge to the court.

It is hardly necessary to go over other portions of the charge to which exception was taken. I am satisfied that the scales of justice were held very evenly balanced throughout the trial.

The other question in the case was whether Angle has a right to abandon the work, and sue on the contract for damages. The work was to be completed, in order that he might earn his contract price, by the first of May following its execution. He abandoned the work in the latter part of January, and in a few days thereafter brought the suit on the contract for damages. I do not understand that anything in the charge conflicts with the principle as laid down by the Supreme Court of Illinois, in the case of *Palm and Robertson* vs. *The Ohio and Mississippi Railroad Company*, (18 Illinois R., p. 22,) where we think the law was correctly exponnded in a very carefully considered opinion by Judge Caton, where the court said.

"We find no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglectedto do some act without which the plaintiff could not, in the nature of things, go on with his contract; as where he refused to furnish a place whereon to erect a building, or to furnish material which, by the contract, was to be put in the works and

which was to be provided by him. In such a case, the act agreed to be done is clearly a condition precedent and indispensable to enable the other party to go on. Where the act which the defendant was bound to do is, by the terms of the contract, made a condition precedent to the performance by the plaintiff, either in the nature of things, or evidently in the contemplation of the parties at the time the contract was entered into, then the failure to do the act does of itself prevent the other party from performing, as much as if he were forbidden to perform it."

Now the plaintiff in this case said that he was hindered in the prosecution of the work by the failure of the raiload company to do this, do that, and do the other thing; among which is the failure to pay the month's installments, which, by the contract, were to be paid. I do not think the mere failure of the company to pay a monthly instalment according to the terms of the contract, would authorize the contractor to abandon the entire work and sue upon the contract. And if that were all that was in the case it might be difficult to sustain a suit, as upon the contract; but that is far from being all. It is perfectly clear from the case that the officers of the railroad company, acting in part for their own interest, that they might reap the profit from the outside arrangements, and acting in combination with another railroad company already operating or about to operate an independent line, set out, in cold blood, to break down this contractor, and prevent him from completing this contract. And the significant act which was done by the company before this suit was brought was that they withdraw their engineering force from the field, which itself would have rendered it impossible for the contractor

to proceed with his work. That act, in connection with other circumstances which I need not detail, was a clear, distinct announcement by the officers of the company, which was never repudiated by the company in its corporate character, or by the action of its Board in any effective form; a clear, distinct announcement by them that that contract was at an end, and that the company did not desire this contractor to proceed and execute it.

Angle had therefore the right to put the natural interpretation upon those facts, which was that the company itself abandoned the contract, and did not intend that he should carry it to a conclusion; consequently his suit was aptly brought upon the contract; and the only question remaining in the case is as to the recovery. It struck me at the time the case was opened, that the recovery was rather an extraordinary one, larger than the facts justified; to be attributed in part to the natural feeling that jurors would have at the injustice which it was proposed to do the contractor, I have no doubt largely due to the argument of counsel who closed the case before the jury.

The road to be built was sixty-seven miles in length. It was to be completed by the first of May following. The contractor was to have $8,500 cash per mile, and $5,000 in stock of the company. The value of the stock the company would depend upon the ability of the company to earn the land grant given by Congress; it would have lost that land grant if the road were not completed by May; the stock was of very little value except with reference to that land grant. I throw out of view any consideration of value of that stock, as, doubtless, the jury did, and as was done in the

argument of this motion; because there was nothing in the contract which prevented the corporation of disposing of the land grant in any way, or at any time they chose; and while, perhaps, disposing of it in advance of the completion of the road was, in a sense, bad faith upon the part of the railroad with the contractor, who doubtless agreed to take part of his pay in stock with reference to its value, the road holding the grant, I see nothing that would authorize the jury to place any particular value upon that stock because the company had disposed or intended to dispose of the land grant. I therefore omit from the consideration of the question the damages in view of the value of the land grant. It appears from the plaintiff's declaration that he substantially completed twenty miles of the sixty-seven, except the laying of iron; and he claims that he was entitled for that much of the work according to the contract price, to the sum of $145,000.

I think the evidence fairly sustains that view, that he was entitled to receive that much on the contract for that portion of the work. So we start with allowing him that $145,000. That amount, however, does not include what he was entitled to for extra work, for, by the terms of the contract, it was estimated that there would be 9,000 cubic yards in each mile; upon that basis the terms of the contract were fixed. It was also provided that for all over 9,000 cubic yards per mile he was to be paid extra according to such compensation as might be agreed upon. The plaintiff also alleges that they a little more than half completed an additional fifteen miles; so we call that, in order to make a calculation, seven and a half miles complete, and he says he is entitled for

that work $54,375. That makes $199,375 for twenty-seven and a half miles of the road substantially complete. That left remaining thirty-seven miles uncompleted. He was entitled, according to the authorities, not being in court himself, and being deprived of the power to complete the contract, he was entitled to a fair profit on the balance of the work which he was prevented from doing. Thirty-seven miles at $8,500 per mile, had he completed the work would have brought him $314,500. Of course he is not entitled to that amount of work because he did not do it; but he is entitled to a fair per cent. upon that amount as a net profit which he would have earned had he been permitted to proceed with that work and complete it. It is very difficult to arrive at what that per cent. ought to be: but we take into consideration the fact that this road was to be constructed through a dense forest, a place somewhat inconvenient, and that the contract provided for work during the winter season, and there were unusual difficulties attending its execution, and our conclusion is that it is fair to allow him 25 per cent. on that aggregate amount as the profit which he might have earned, making $78,625 on the basis of the contract. He was further entitled, by the terms of the contract, to compensation for all the extra earth work over and above 9,000 cubic yards per mile. According to the proof there were over 16,000 cubic yards per mile, making a surplus per mile of extra earth work of over 7,000. The amount claimed by the plaintiff as a fair profit on that kind of work is twelve per cent. That we think he is fairly entitled to, which would make $58,460, making an aggregate of $336,460.

Payments were admitted on the trial of $132,205, which would leave the result $204,255. We are of opinion that upon any fair view of the evidence that the verdict is in excess of the fair amount by $146,745. The motion for a new trial I recommend to the Circuit Judge—I say recommend, because I did not hear the witnesses, and the order should more properly come, I think, from the Judge who tried the case—I therefore recommend to him that the order for a motion for a new trial be denied, provided the plaintiff shall, within ten days, remit from the verdict $146,745, and in default of their so doing the vendict will be set aside and a new trial ordered.

THE COURT: (Judge Gresham.) Such an order will be ent red by the Circuit Judge.

Mr. OSBORN: If the court please, I desire to call the court's attention to the application we made as to further time for preparing and filing the bill of exceptions, and I wanted to say that owing to some recent and very important litigation, Mr. Pinney, who expected to prepare the bill of exceptions, has asked me to apply to the court, and he said that would make no difference certainly if it was settled by the first of September. It seems to me that could not make any difference with the gentlemen. It is simply the preparation of the papers in the case. The court knows the length of the papers. the immense record there is, and the immense work there is in it.

Judge GRESHAM: We do not yet know whether they will not accept the suggestion of the court and make the remittitur from the judgment.

Mr. OSBORN: I assume they will do that.

Judge GRESHAM: We will say the time is extended until the 10th of August. If you do not agree upon a bill of exceptions by that time, you will never agree.

Mr. OSBORN: The only trouble is writing it out by that time.

Judge GRESHAM: The mere mechanical part of it can be done by clerks, and that can be done quite rapidly.

Mr. OSBORN: When this order is entered, will your Honor enter an exception?

Judge GRESHAM: Oh, yes.

CONSTITUTION OF WISCONSIN.

ARTICLE VIII.

Section 10. The State shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion.

ARTICLE XI.

Section 1. Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the Legislature at any time after their passage.

LAWS OF WISCONSIN.

CHAPTER 118.

[Published November 12, 1856.]

An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an Act of Congress entitled: "An Act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State;" approved June 3, 1856. The

people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. That the lands, rights, powers and privileges granted to and conferred upon the State of Wisconsin by the Act of Congress entitled: "An Act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State;" approved June 3, 1856, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said Act of Congress, and the said State of Wisconsin hereby assumes and undertakes the trust created by the said Act of Congress.

Section 2. This act shall be in force as soon as the same is published.

Approved, October 8, 1856.

Joint Resolution accepting the lands granted to the State of Wisconsin, by an Act of Congress entitled: "An Act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5, 1864.

Resolved, by the Senate, the Assembly concurring, That the lands granted to the State of Wisconsin, for the purpose of aiding in the construction of certain railroads within this State, by virtue of an Act of Congress entitled: "An Act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5, 1864, be and the same are hereby accepted by the State of Wisconsin, subject, however, to all the conditions of said Act of Congress. And the State of Wisconsin hereby consents to execute the said trust created by the aforesaid Act of Congress, pursuant in all things to the terms, limitations and conditions of said Act.

Resolved, that the Secretary of State be and he is hereby authorized and required to transmit a certified copy of this resolution to the Secretary of the Interior of the United States.

Approved, March 20, 1865.

Railroads may mortgage lands granted them.

Section 1859 (*Revised Statutes 1878*). Any railroad corporation upon which any lands shall have been conferred to aid in the construction of any railroad or to which any such lands shall have been sold, assigned, or transferred, may, to raise money to construct such road, mortgage or convey by any mortgage or deed of trust in addition to such property as is hereinbefore provided for, any and all such lands so conferred upon it, and thereby pledge the entire avails of such lands, when acquired by such corporation and sold, &c.

[Published March 11, 1874].

CHAPTER 126.

An Act to confer certain lands upon the North Wisconsin Railway Company, and the Chicago and Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the State of Wisconsin by its acceptance of the grants of land made by Congress by Acts approved June 3, 1856, and May 5, 1864.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. There is hereby granted to the North Wisconsin Railway Company all the right, title and interest which the State of Wisconsin now has or may hereafter acquire in and to the lands granted to said State by Acts of Congress approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St. Croix river or lake, between Townships twenty-five and thirty-one to the west end of Lake Superior and Bayfield, except those herein granted to the Chicago & Northern Pacific Air Line Railway Company, this grant being for the purpose of enabling the said North Wisconsin Railway Company to complete the railroad heretofore partially constructed by them from the St. Croix river or lake aforesaid to Bayfield.

the said grant being, however, upon the express condition that the said company shall immediately proceed with the construction of said road from the St. Criox river or lake to Bayfield, and shall construct so much thereof the first year as shall, with that already constructed, make forty miles, and not less than twenty miles each year thereafter until the entire road is completed.

Sections 2, 3, 4, 5, 6, 7 omitted.

Section 8. There is hereby granted to the Chicago & Northern Pacific Air Line Railway Company all the right, title and interest which the State of Wisconsin now has or may hereafter acquire in or to that portion of the lands granted to said State by said two Acts of Congress, as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the City of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly at the rate of twenty miles per year.

Section 9. The Governor is hereby authorized and directed, upon the presentation to him of satisfactory proof that twenty continuous miles of that part of the railway of said company first above mentioned have been completed in accordance with said Acts of Congress and this Act, to issue and deliver or cause to be issued and delivered to said company, patents in due form from said State for two hundred sections of said land, and thereafter, upon the completion of twenty continuous miles of said railway, he shall issue or cause to be issued and delivered to said company, patents for two hundred sections of said lands, and on the completion of that part of the railway of said company lying

between the point of intersection and the west end of Lake Superior, he shall issue and deliver or cause to be issued and delivered to said company, patents for the residue of said lands hereby granted to said company.

Section 10. The moneys in the State Treasury collected from trespassers on the lands included in the grants to aid in the construction of a railroad from St. Croix lake or river to the west end of Lake Superior and to Bayfield, and all moneys that may hereafter be collected by the State from trespassers on said land, shall be apportioned by the State Treasurer between the said Chicago & Northern Pacific Air Line Railway Company and the company or companies to whom the residue of the said lands shall be granted, in proportion to the number of acres granted to each, and upon the presentation to the State Treasurer of satisfactory proof that the said Chicago & Northern Pacific Air Line Railway Company has completed twenty miles of its railway between said point of intersection and the west end of Lake Superior, as required by this Act, it shall be the duty of such Treasurer, and he is hereby directed to pay over to said company so much of said moneys collected from trespassers as shall be apportioned to it.

Section 11. All lands conveyed to said Chicago & Northern Pacific Air Line Railway Company by the State in pursuance of this Act shall be subject to taxation from the date of the conveyance thereof by the State.

Section 12. The said Chicago & Northern Pacific Air Line Railway Company shall, within sixty days from and after the passage of this Act, file with the Secretary of State a resolution duly adopted by the board of directors, accepting this grant upon the terms and conditions herein contained, and shall also, within sixty days, give to the State of Wisconsin such security for the completion of that portion of its railway lying between said point of intersection and the west end of Lake Superior, in accordance with the provisions of said Acts of Congress and this Act, as shall be required by the Governor: *Provided, however*, that said security shall be of no force or effect until Congress shall have passed an Act renewing said grants or extending the time for the construction of said road, or until it shall have

been decided by the Supreme Court of the United States that the present title of the State is absolute and indefeasible; and upon the failure of said company to file said resolution and to give the said security within the time hereinbefore limited, this act shall be of no effect so far as its grants to said company any interest in or right to said lands.

Section 13. If said Chicago & Northern Pacific Air Line Railway Company shall fail to file said resolution and to give said security, as provided by the preceding section, then said lands shall vest in the North Wisconsin Railway Company, upon the company filing with the Secretary of State a resolution of its Board of Directors, and executing and delivering to the State Treasurer a bond, as required by section four of this act; and in case the said North Wisconsin Railway Company shall fail to file such resolution and to execute and deliver such bonds within twenty days after the forfeiture of its rights to said lands [by] the said Chicago & Northern Pacific Air Line Railway Company, then it shall be the duty of the Governor, as the agent of the State, to proclaim a forfeiture by said company of all its rights and privileges under this act, and thereupon any other railway company that shall first, after said proclamation, file with the Secretary of State a resolution of its Board of Directors accepting said grant upon the terms and conditions of said Acts of Congress and of this act, and shall deposit with the State Treasurer security, to be approved by the Governor, to construct said road in accordance with the provisions of said Acts of Congress and of this act, shall succeed to the rights and privileges herein conditionally granted to said Chicago & Northern Pacific Air Line Railway Company, as fully as though this act had in the first instance applied to said company.

[Published March 28, 1878.]

CHAPTER 229.

An act to extend the time for the construction and completion of the railway of the Chicago, Portage & Superior Railway Company.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. The time limited for the construction and completion of the railway of the Chicago & Northern Pacific Air Line Railway Company, now the Chicago, Portage & Superior Railway Company, by chapter one hundred and twenty-six of the Laws of Wisconsin for 1874, entitled "An Act to confer certain lands upon the North Wisconsin Railway Company and the Chicago & Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the State of Wisconsin by its acceptance of the grants of land made by Congress by acts approved June 3, 1856, and May 5, 1864," is hereby extended three years.

Section 2. This act shall take effect and be in force from and after its passage and publication.

Approved March 16, 1878.

[Published February 17, 1882]

CHAPTER 10.

An Act to revoke, annul and resume the grant of lands made by Chapter 126 of the Laws of Wisconsin for the year 1874, to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company), and to repeal Sections 8, 9 and 10 of said Chapter 126, and to confer said grant of lands upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. The grant of lands made to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company), by Section 8 of Chapter 126 of the Laws of Wisconsin for the year 1874, entitled "An Act to confer certain lands upon the North Wisconsin Railway Company and the Chicago & Northern Pacific Air Line Railway Company, and to execute the trust assumed by the State of Wisconsin, by its acceptance of the grants of land made by Congress, by acts approved June 3, 1856, and May 5, 1864," is hereby revoked and annulled, and said lands are hereby resumed by the State of Wisconsin.

Section 2. There is hereby granted to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, all the right, title and interest which the State of Wisconsin now has, or may hereafter acquire in, and to the lands granted to said State by acts of Congress, approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the Saint Croix river or lake, to the west end of Lake Superior and Bayfield, which are applicable, under said acts of Congress, to the construction of that portion of said railroad from the Saint Croix river or lake, to the west end of Lake Superior, which lies between the point of intersection of said last-named railroad, by the Bayfield branch as fixed by the surveys and maps of said railroad, and the branch on file in the general land office in Washington, and the west

end of Lake Superior. This grant is upon the express condition that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall continuously proceed with the construction of the railroad now in part constructed by it between said point of intersection and the west end of Lake Superior, and shall complete the same so as to admit of the running of trains thereover on or before the first day of December, A. D, 1882.

Section 3. The Governor is hereby authorized and directed upon the presentation to him of satisfactory proof of the completion by said Chicago, St. Paul, Minneapolis & Omaha Railway Company, of the first twenty miles of said railroad from said point of intersection toward the west end of Lake Superior, in accordance with said acts of Congress and this act, to issue and deliver, or cause to be issued and delivered to said company, patents for all lands applicable under said acts of Congress to said twenty miles of completed road, and thereafter, upon the completion by said company of any twenty continuous miles of its said railroad, he shall issue and deliver, or cause to be issued and delivered, patents for all of said lands so applicable to such twenty miles of completed railroad, and upon the completion of said railroad, he shall issue and deliver, or cause to be issued and delivered, patents for the residue of the lands so hereby granted.

Section 4. The said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall, within three days from and after the passage of this act, pay to the Governor, for the purposes, and to be disposed of as hereinafter, in this act, provided, the sum of seventy-eight thousand dollars; and give such security as the Governor shall require to fully indemnify and save harmless, the State against all liability and expenses incurred in feeding the laborers hereinafter mentioned, should the sum named in section 6 hereof prove inadequate for the purpose, and shall, within thirty days from and after the passage of this act, file with the Secretary of State a resolution certified by the president and secretary, under its corporate seal, to have been duly adopted by its board of directors, accepting the grant upon the terms and conditions herein contained; and shall, within said thirty days, give to the state of Wisconsin such security for the completion of said rail-

road between said point of intersection and said west end of Lake Superior, in accordance with said acts of Congress and with this act, as shall be required by the Governor, and upon failure of said company to deposit said moneys or to file said resolution, or to give such security within the times hereinbefore limited, this act shall be of no force or effect whatever.

Section 5. It shall be the duty of the Governor to appoint, immediately upon the payment to him of the money in the preceding section mentioned, some suitable person, who shall forthwith investigate and ascertain the amounts honestly and actually due, and to whom due, for labor and supplies done and furnished prior to January 20, 1882, in and about the grading and other work done by or under the auspices of said Chicago, Portage & Superior Railway Company, between said point of intersection and said west end of Lake Superior, and so much of said sum so to be paid to the Governor as aforesaid, as shall be necessary therefor not exceeding, however, in all seventy-five thousand dollars shall be disbursed, under the direction of the Governor and with his approval, upon the report of his said agent, or otherwise, as he may be best advised, in the payment and settlement of said claims. In disbursing said money the *bona fide* claims of laborers shall be first paid and the amount which shall remain, if any, after the payment of said claims of laborers, shall be applied to the payment of *bona fide* claims of sub-contractors and material and supply men, in full, if sufficient remains therefor; otherwise shall be divided *pro rata* among them upon such basis as shall seem to the Governor and his said agent just in the premises. All claims, so to be paid out of said fund hereunder, shall be presented to the Governor within ninety days after the passage of this act, or the same shall be barred from participation in said fund: Provided, however, that in no case shall the assignee of any labor claim, hereinbefore mentioned, be entitled to receive out of said fund more than the amount which the Governor and his said agent shall be satisfied was actually paid, by said assignee, for the claims so assigned and presented by him; and, provided further, that in ascertaining the amounts due to sub-contractors, as aforesaid, no claims for profits

earned or prospective, on any sub-contract, shall be considered or allowed; and, provided further, that nothing in this act contained, or the payment of said money to the Governor as aforesaid, shall be taken or deemed to be an admission by the said Chicago, St. Paul, Minneapolis & Omaha Railroad Company of any liability whatever for the debts of said Chicago, Portage & Superior Railway Company, or of any person or persons, corporation or corporations. Provided further, that the said money, so to be paid to the Governor as aforesaid, shall not, while in his hands, be liable to garnishment, attachment or other legal process.

Section 6. The Governor shall pay out of the moneys so to be paid to him in excess of said seventy-five thousand dollars, the compensation and expenses of said agent, and shall reimburse the State for all expenses incurred in the premises; and if, after payment of said claims as herein provided, and after payment of said expenses, there shall remain any surplus, he shall pay the same over to the said Chicago, S. Paul, Minneapolis & Omaha Railway Company.

Section 7. Sections 8, 9 and 10 of said Chapter 126 of the Laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provisions of this act are hereby repealed.

Section 8. This act shall take effect and be in force from and after its passage and publication.

Approved, February 16, 1882.

[Published March 7, 1883.]

CHAPTER 29.

An act to confirm the revocation, annulment and resumption made by Chapter 10 of the Laws of Wisconsin for the year 1882, and to confirm the grant of land made by said Chapter 10.

The people of the State of Wisconsin represented in Senate and Assembly do enact as follows:

Section I. The revocation, annulment and resumption made by Section 1 of Chapter 10 of the Laws of Wisconsin for the year 1882, of the land grant mentioned in said section are hereby fully in all things confirmed.

Section II. The grant of land made by said Chapter 10 of the Laws of 1882 to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, is hereby in all respects fully confirmed.

Section III. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed.

Section IV. This act shall take effect and be in force from and after its passage and publication.

Approved, March 5, 1883.

ACTS OF CONGRESS.

ACT OF JUNE 3, 1856.

An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That there be, and is hereby, granted to the

State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width, on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, * * * *Provided further*, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatsoever; *and provided further*, that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this action, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Section 3. And be it further enacted, that the said lands hereby granted to said State shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.

Section 4. And be it further enacted, that the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty con-

tinuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

Act of May 5, 1864.

An act granting lands to aid in the construction of certain railroads in the State of Wisconsin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That there be and is hereby granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any section or parts thereof, granted as aforesaid. * * * * *

Section 5. And be it further enacted, That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six, be and the same is hereby extended to a period of five years from and after the passage of this act.

Section 6. And be it further enacted, That any and all lands reserved to the United States by any act of Congress. * * * * * *

Section 7. And be it further enacted, That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, as far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed.

Approved, May 5, 1864.

LAKE SUPERIOR
Duluth
Superior
St Croix River
Hudson
Mississippi River
STATE OF WISCONSIN
Portage
Madison
Green
Chicago
LAKE MICHIGAN
Scale of Miles.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

TERM NO. 310.

SARAH R. ANGLE, ADMINISTRATRIX OF THE ESTATE OF HORATIO G. ANGLE, DECEASED,
Appellant,

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Appellee.

MOTION TO EXTEND TIME FOR ARGUMENT.

And now comes the appellant, by her counsel, J. R. Doolittle, and moves this court for leave, under rule 22, before the argument begins, to extend the time for argument, so far as to give to the appellant a half hour to state the material allegations of the bill of complaint before the argument begins.

J. R. DOOLITTLE,
Of Counsel for Appellant.

Suggestions Submitted on the above Motion.

May it please the Court:

As this case stands simply upon general demurrer to the bill of complaint, we ask special leave, under rule 22, to state the material allegations of the bill, or so much as may be necessary, to bring this case fairly before the court before the argument begins.

This request is I confess, partly a *personal one.* It has been deemed advisable that I should open the case; but I fear the time required to make a fair statement of the material allegations of the bill, however concise, would leave very little time for argument, without seriously abridging the time of Mr. Ewing, my able associate—the thought of which would embarrass me from the beginning.

This case is one of the greatest possible importance to my client. It now involves over $250,000. It involves also questions of great public importance; I might say, questions of public policy.

The subject-matter of the contention is a munificent land grant by Congress to the State of Wisconsin;—worth at least $4,000,000, to aid in the construction of a railway only sixty-five miles long;—worth in fact more than enough to build the railway twice over. The parties defendant, are two railway corporations at war with each other, war to the death;—this very land grant being the "bone of contention." Their names in full are, the Chicago, Portage and Superior Railway Company, and the

Chicago, St. Paul, Minneapolis and Omaha Railway Company, for convenience called the "Portage Company," and the "Omaha Company."

The State of Wisconsin first gave the land grant to the Portage Company, on condition that it would complete the railway on or before May 5, 1882; that company was financially very weak. If it should succeed in completing the railway in time to earn the land grant, it would have been rich and solvent; if it failed, it would lose the land grant and become bankrupt, as it afterwards did.

The plaintiff, the appellant here, is the widow and administratrix of Horatio G. Angle, the railway contractor, who, on the faith of the land grant, in August, 1881, contracted with the Portage Company to complete its railway and earn for it the land grant, on or before May 5, 1882, according to the condition of the grant. For his compensation for doing all the work, he was to be paid $8,500 cash and $5,000 in stock, per mile.

Having earnestly entered upon the work, he had so far progressed by the middle of January, 1882, that more than one-half of all the work of construction was already done. He then had 1,600 men at work, and it had then become an assured fact (as found by the jury in the court below), that he had made such progress that, but for the acts of the Omaha Company, the other defendant, he would have completed the railway and earned the land grant for the Portage Company, but, on or about that date, the Omaha Company, the appellee here, the main defendant, and, as we think, the criminal defendant in this case, a rich and powerful corporation, which had already had the benefit of one land grant and coveted the one which the Portage Company was endeavoring to earn, knowing all the facts, wilfully, wrongfully and un-

lawfully conspired with and bribed certain officers and trustees of the Portage Company, to wreck that company—to break it down—to break down its contractor. In pursuance of that conspiracy, the Omaha Company by fraud and corruption procured an assignment of all the stock, assets, franchises, including the land grant of the Portage Company, to be made over to an agent of the Omaha Company, and in its interest, and immediately thereafter, the Omaha Company, through its agent, claiming to be the purchaser and the assignee of the Portage Company, and of its land grant, caused and compelled the contractor to stop all work under his contract, whereby said land grant became afterwards forfeited by the said Portage Company to the state; and whereby, also, in pursuance of the same conspiracy, fraud and corruption by the officers of the Omaha Company, practiced upon the officers of the Portage Company, the said Omaha Company caused and procured the same land grant to be transferred by the state to itself, and which it now holds in fraud of the said contractor and all other *bona fide* creditors of the Portage Company, whereby the said Omaha Company holds as trustee in its own wrong the said land grant and all the avails thereof.

The bill in this case (which the demurrer admits to be true), gives the simple history of how all this was done—a history of the wrecking of one feeble railway, and the stealing away of its land grant by another more powerful, and crushing between them the innocent contractor, an entirely innocent party in the case, as between the upper and the nether mill stone; a history, I venture to say, which is without parallel, in this or any other country.

In using such strong language to charaterize this case, I do not go beyond what the learned Justice HARLAN

said, when he overruled the motion for a new trial in the court below on the law side, and when he rendered the judgment at law to which this creditor's suit is merely ancillary. He then said: "It is perfectly clear from "this case that the officers of the" (Portage) "railway "company, acting in part for their own interest, that they "might reap the profits from outside arrangements, and "acting in combination with another" (the Omaha), "Railway Company, already operating or about to op- "erate an independent line, set out in cold blood to break "down this contractor, and prevent him from completing "his contract." (See opinion of Justice Harlan, p. 5.)

Leave is asked to state the allegations of the bill, or so much as shall be necessary to bring the history of this case fairly before the court, before the argument begins.

However briefly done, that will consume half of the hour allotted to me for argument. Unless this leave be granted, I fear I shall not be able to do justice to the case itself, nor to my client, nor to counsel on the other side, nor to myself, in presence of this high tribunal, in a case so worthy of one of the best efforts of my life.

I sincerely hope such leave may be granted, that the time for argument shall begin after the statement of the allegations of the bill.

Very respectfully submitted.

J. R. DOOLITTLE,
Of Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

TERM No. 73.

Sarah R. Angle, Administratrix of the estate of Horatio G. Angle, deceased,
Appellant,

vs.

The Chicago, St. Paul, Minneapolis and Omaha Railway Company, formerly known as the Chicago, Portage and Superior Railway Company,
Appellee.

BRIEF FOR APPELLANT.

J. R. DOOLITTLE,
OF COUNSEL FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

TERM No. 73.

Sarah R. Angle, Administratrix of the estate of Horatio G. Angle, deceased,
Appellant,

vs.

The Chicago, St. Paul, Minneapolis and Omaha Railway Company, impleaded with the Chicago, Portage and Superior Railway Company,
Appellee.

BRIEF FOR APPELLANT.

MAY IT PLEASE THE COURT:

This is an appeal from a decree of the United States Circuit court for the Western District of Wisconsin, which sustained a demurrer for want of equity, filed by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, (hereafter caalled the "Omaha Company,') which was made defendant in a creditors' bill to enforce a judgment against the Chicago, Portage and Superior Railway Company, in favor of the appellant.

STATEMENT.

1. In 1864 Congress granted to Wisconsin, to aid in building a railroad from the St. Croix river to the west end of Lake Superior—about sixty-five miles—every alternate section of land for ten sections in width, on each side,—(Rec., 4)—about 400,000 acres, (Rec., 18.)

2. The state granted the lands, *in presenti*, to the Chicago, Portage and Superior Railway Company, (hereafter called "The Portage Company.")

3. The grant was duly accepted, and became a valid contract between the state and the Portage company, upon condition of its completing the railway by a certain time. That time, as extended and fixed by law was May 5, 1882. (Rec., 5.)

4. In August, 1881, the "Portage Company" contracted with Horatio G. Angle, to build the railway. He entered upon the work; and made great progress,—so great, that by the 20th day of January, 1882,—(the day when, as will be seen hereafter, a total breach of the contract was caused by the defendant, the Omaha company,) the whole work was more than half done; over 1,500 men were still at work, and it had then become assured, that but for the wrongful acts of the Omaha company, to hinder and prevent it, the railway would have been completed by him on time. (Rec., 6.) The land grant would have been earned by the Portage company.

Total Breach of the Contract Directly and Wilfully caused by the Omaha company.

5. I repeat: On the 20th day of January, 1882, the contract with Angle was broken. Without his fault it

was put out of his power to go on. Such breach was caused directly by the "Omaha company", claiming to have become the purchaser and assignee in equity of all the stock, control and land grant of the "Portage company". As such purchaser, it advised and induced the engineer of the "Portage company" then in charge, to withdraw all its engineering forces then at work on the railway, whereby further performance by Angle was made impossible. (Rec., 14.)

6. Immediately after the breach, and before any forfeiture of the grant had been made in fact, or the Legislature took any action, Angle commenced the suit, in which judgment was recovered in the court below, on the law side, against the Portage company for his damages for that breach. Under his contract he was to have for his work $8,500 per mile in cash, and $5,000 per mile in stock of the Portage company; (in round numbers $552,500 in cash and $325,500 in stock), upon the completion of the work on time. (Rec., 6, 17.)

7. Soon after, Angle died. (For it seems this disaster not only broke him down financially, but it broke his heart, and hurried him into his grave.) The suit was revived, however, and went on in the name of his widow, and administratrix, Sarah R. Angle, the appellant here. And, on the 31st day of January, 1887, after a long trial (fiercely contested by the Omaha company), she recovered judgment against the Portage company for $205,883.19, the damages her husband had sustained for the breach of his contract. (Rec., 2, 3, 6.)

8. The bill sets out, in usual form, the issuance of execution upon that judgment against the "Portage company;" its return *nulla bona*; the insolvency of the "Portage company," by reason of the forfeiture of

its land grant, which was caused wholly and directly by the "Omaha company"—the real defendant in interest—as we shall see. It was caused by it, wilfully and wrongfully; and for the double purpose of obtaining great pecuniary advantages in two ways; *first*, by preventing the building and the operating of a competing railway, of itself an enormous pecuniary advantage; and, *second*, by obtaining a grant of the same lands to itself, worth $4,000,000, or twice the cost of the railway; as it afterwards did, as hereafter stated.

The bill contains also all the other usual charges of a creditor's bill, ancillary to a judgment at law; and some special ones to show the *equitable liability of the Omaha company to pay the judgment*, aside from any interest the Omaha company afterwards obtained in the land grant itself.

9. It specially charges that in the suit at law of Angle against the Portage company during his life-time, as well as after his death, when revived and prosecuted by the appellant, and down to the trial and judgment, *the defendant, the "Omaha company," became and was the real defendant in interest in the litigation.* (Rec., 17.)

Although it did not appear of record as such, it did, in fact, appear in court by its general counsel and solicitor; it did pay all the fees of counsel and witnesses, and all the expenses of the litigation on the part of the defense. (Rec., 17, 18.)

Such admitted relation as defendant in interest, was assumed by the Omaha company, because it claimed to be the equitable assignee and owner of all the valid stock of the Portage company as well as of all its rights and franchises, and of all its interest in *this very land grant by purchase of the Portage company.*

10. The bill in this behalf charges that on the 10th day of January, 1882, (ten days before the Omaha company caused the breach of contract with Angle), the Omaha company declared in explicit terms in writing, its purpose to obtain this land grant from the Portage company *by negotiation with the Portage company and by the payment of money thereto.* (See Ex. K, Rec. 50, at length.)

This court will find all of this exhibit to be instructive and interesting reading. It is the plan of the campaign, preceding a great battle, between railway corporations, (where the stronger seeks to wreck the weaker and to destroy, or to steal its land grant).

We will read only two short extracts to show the declared purpose of the Omaha company (Rec. 50, 51) to obtain this grant by *purchase of the Portage company.*

First Extract. "This agreement, made this 10th day "of January, A. D. 1882, between the Chicago, St. "Paul, Minneapolis and Omaha Railway Company, "party of the first part, the Chicago, Milwaukee and "St. Paul Railway Company, party of the second part, "and the Chippewa Valley and Superior Railway Com- "pany, party of the third part. That the party of the "first part (the Omaha company,) in consideration of "the agreements of the parties of the second and third "part hereinafter expressed, agrees, first, that in case "the said party of the first part (the Omaha company) "*shall obtain the land grant heretofore granted to the* "*Chicago, Portage and Superior Railway Company, in* "*the State of Wisconsin, either by grant of the Legisla-* "*ture or negotiation with said Chicago, Portage and* "*Superior Railway Company, or by both such grant and* "*negotiation*, the said party of the first part will give

" to the party of the third part, one equal fourth part " of the lands received under said grant."

Second Extract. "It is further agreed and understood " that *in case it shall become necessary to pay the said " Chicago, Portage and Superior Railway Company any " money in order to procure an assignment of its interest " in said grant*, that the party of the third part shall " pay its proportion of said amount, being as one to " three, or relinquish all right to any portion of said " grant."

11. Ten days afterwards, on the 20th day of January, 1882,—in order to carry out such declared purpose, the Omaha company through its agent entered into a written contract with certain officers of the Portage company, to transfer to him all the valid outstanding stock of the Portage company, (which was then in their hands in trust for another purpose, as was then well known by the Omaha company) with all its rights, assets and franchises, *including all its interest in this land grant.* (Ex. L, Rec., 52-57. See at length; also Rec., 12, 13.)

12. "This bargain was reduced to writing and ex- " ecuted *in the name of its agent as party of the second " part, but as expressly charged in the bill and admitted " in the demurrer, it was made in the interest and at the " instance of the 'Omaha company.'* (Rec., 12.) The " bill charges also, and the demurrer admits, that a " large part of the consideration, ($200,000), agreed to " be paid in this agreement, WAS A BRIBE TO CERTAIN " OFFICERS OF THE PORTAGE COMPANY TO BETRAY THEIR " TRUST, BY TRANSFERRING ALL THE VALID OUTSTANDING " STOCK OF THE COMPANY THEN HELD BY THEM IN EXPRESS " TRUST; AND, TO LEND THEIR INFLUENCE TO ASSIST SAID " AGENT, THEN ACTING SOLELY FOR THE OMAHA COMPANY

"AND IN ITS INTEREST, TO GET FOR IT THE ASSIGNMENT "AND CONTROL AND POSSESSION OF THE PORTAGE COM- "PANY, ITS FRANCHISES AND ESPECIALLY ITS LAND GRANT." (Rec., 13.):

13. Assuming to have obtained all that, by negotiation with the Portage company, the Omaha company, immediately afterwards, on the same day, the 20th day of January, 1882, advised and induced the chief engineer of the Portage company, then in charge of construction of the railway, to call off all his staff, including seven engineering corps, then at work. (Rec., 14.) By this act alone, the Omaha company compelled Angle to suspend all further work.

14. The bill alleges, that the Omaha company thus claiming to be the owner of, and assignee in equity, with a paramount right to the possession and control of the Portage company, assumed as its assignee and sucessor the right to break and did break the contract of Angle with the Portage company. For its own purpose and in its interest, as above stated, and with full knowledge of all the facts, as such assignee, it caused the very breach of the contract for which the suit at law was commenced; *for which the judgment was recovered, nominally against the Portage company, its assignor, though, as the bill alleges, and the demurrer admits, the "Omaha company" assumed itself to be and was then in fact, the real defendant in interest.* (See Rec. 14.)

15. The bill alleges that the land grant was worth $4,000,000; that when thus deprived of it, the Portage company was utterly insolvent. That with it, it would be solvent and its stock, (of which Angle would be entitled to $325,000) would be valuable; that the land grant was the only source or fund, and the very source

or fund upon which Angle relied to obtain compensation under his contract; that the Portage company had no other real or personal property to satisfy the judgment other than its interest in the land grant; (Rec., 6-17) and, that the Omaha company, its officers and agents well knew the same. (See Rec., 11).

16. The bill also further alleges that the Omaha company, assuming thus to have acquired by negotiation, the right to the control and direction of the Portage company, with all its franchises, including this land grant, as such assignee, *and not having yet obtained the actual and complete control over all its acting officers and directors, on the 11th day of February, 1882, filed a bill in the name of its agent and trustee, in the Circuit court of Cook county, Illinois, in which such purchase and assignment above mentioned of the Portage company, and of its land grant was set out and thereupon, without notice of hearing to the Portage company, it falsely and fraudulently caused an injunction from said court to be sued out and served upon the President and officers of the Portage company to restrain them from doing any act whatever in the name or in behalf of the Portage company,* WHEREBY THE OMAHA COMPANY PUT IT OUT OF THE POWER OF THE PORTAGE COMPANY TO TAKE ANY STEP OR MEANS WHATEVER TO COMPLETE SAID RAILWAY BY MAY 5, 1882, AND DIRECTLY CAUSED THE PORTAGE COMPANY TO FORFEIT ITS LAND GRANT TO THE STATE. (Rec., 15.)

Certain important questions were determined on the trial at law.

17. The bill specially alleges also, that upon the trial at law, certain questions of fact, viz.: whether Angle had in good faith fulfilled the contract on his part; and whether he had so far progressed as to be able to com-

plete the railway within the time required, and thereby fulfill the condition of, and earn the land grant for the Portage company, were tried and determined in favor of the appellant, both against the Portage company, as the nominal defendant, and also against the Omaha company, the real defendant in interest, *whereby the Omaha company is estopped from now saying in this court that said Angle could not or would not have fulfilled his contract, and earned the land grant for the Portage company, if he had not been prevented by the wrongful act of the Omaha company, as above stated.* (Rec., 6, 17, 18.)

So much for what occurred before Angle brought his suit.

MAY IT PLEASE THE COURT:

We now come to state what was done, *after* the suit was commenced and *after* Angle's rights were vested, by way of legislative grants.

18. The Omaha company now claims to be the beneficial owner of the same lands formerly granted to the Portage company, free and discharged from all trust by reason of its fraud and bribery practiced upon the Portage company and upon Angle. It claims it by force of two acts of the legislature *both of which were passed after Angle commenced the suit at law.* (Rec., 7.)

The first one was passed February 16, 1882.

The bill alleges that one was null and void under the constitution of the United States, because it impaired the contract in the grant to the Portage company, while it was still in full force, as it did not expire until May 5, 1882.

The other act was not passed until March 5, 1883,

more than a year after Angle's suit was commenced, in February, 1882. (Rec., 17.) This second act was passed in order to confirm the first one which was clearly void.

Upon this subject of legislative grant, I wish to state, first of all,

WHAT THE BILL DOES NOT ALLEGE:

19. *It does not allege that the Legislature in passing either of those Acts, was bribed or corrupted by the Omaha company or acted under undue influence or from any improper motive whatever.*

It does, indeed, question the validity of the first act passed while the grant to the Portage company was still in force, because if valid, it would impair the obligation of the contract between the state and the Portage company. (See Rec., 7.)

But the bill in no manner imputes corruption or improper motive, undue influence or improper or indecent conduct or want of wisdom or patriotism to the legislature or to any of the members thereof. We emphasize this statement, because, right here, upon this point, in our opinion, is where the learned justice who sustained this demurrer in the court below, fell into the most serious error of supposing that our bill calls in question the motives or the wisdom of the legislature.

What the bill does charge on this point is set out at length on pages 9 to 16, inclusive, of the record, to which we call special attention.

Time will not allow reading at length. The substance is this: Not to call in question the legislature in the slightest degree, but to charge in strongest terms

the fraud, corruption and bribery of the Omaha company, practiced upon the Portage company and upon Angle.

20. The Omaha company, well knowing that Angle, if not prevented, was about to complete his contract on time, and thereby to secure the land grant to the Portage company, wilfully, wrongfully and illegally conspired with, and bribed and corrupted certain officers of the Portage company, and by such means induced them to sell out to the Omaha company the stock and the control of the Portage company and of its land grant; and, then and there, induced them also to assist the Omaha company to hinder and prevent Angle, the contractor, from completing the railway under his contract, and from earning the land grant for the Portage company; and also thereby, in pursuance of such conspiracy, caused and induced them to assist the Omaha company to wreck and to bankrupt the Portage company as well as to break down the innocent contractor.

In using such strong language I do not go beyond what the learned justice said when he overruled the motion for a new trial in the court below on the law side, and rendered the judgment to which this creditor's suit is merely ancillary. He then said: "It is perfectly clear "from this case that the officers of the (Portage) rail-"way company, acting in part for their own interest, "that they might reap the profits from outside arrange-"ments, and acting in combination with another (the "Omaha) railway company, already operating, or about "to operate, an independent line, set out in cold blood to "break down the contractor and prevent him from com-"pleting his contract." (See opinion of Justice Harlan, page 5.)

21. The bill also charges that it conspired with the well known officers of the Portage company, and the very ones who were authorized to speak for the Portage company, as they lawfully might, before committees of the legislature, to falsely represent that the Portage company had made no substantial progress towards the completion of its railway; to falsely represent that it never had any considerable number of men at work upon the railway; to falsely represent to said legislature that the Portage company had voluntarily abandoned all attempt to complete the same; and, to falsely represent that it was then willing to have its land grant forfeited to and resumed by the state, and given over, at once, by the same act to the Omaha company. (Rec., 12, 13, 16.)

Whereupon, the legislature "relying, as it reasonably "might, on these false representations, and being inno- "cently imposed upon thereby, without inquiry or hear- "ing, hurriedly passed the act of February 16, 1882, "above named, to forfeit the land grant of the Portage "company and to confer it on the Omaha company." (See Rec., 16.)

AUTHORITIES CITED IN THIS BRIEF.

Sumner v. *Sleeth*, 87 Ill. Rep., p. 500–503.

Chip. Val. R. R. v. *Omaha Co.*, 75 Wis. Rep., 224.

2 Greenleaf Ev., 108, Note 3.

Putnam v. *Wise*, 1 Hill, 234, and Note A.

Lightley v. *Conston*, 1 Taunton, 112.

Perry on Trusts, §181.

Before stating the formal assignment of errors and entering upon my opening argument, it is proper to say, I shall not be able to discuss, at length, all the fundamental propositions upon which the decree of the court below should, in our opinion, be reversed; but a part of them only. Five main propositions were stated with great precision and force, in a Brief submitted by my learned associate (Mr. Ewing) in *Farmers' Loan and Trust Company* vs. *Postage Co. et al.*, to which I beg to call the special attention of the court and the counsel on the other side as follows:

First.—The Chicago, St. Paul, Minneapolis and Omaha Railway Company (hereinafter called the Omaha Company), wrongfully and fraudulently prevented the Chicago, Portage and Superior Railway Company (hereinafter called the Portage Company) from complying with the condition of the land grant, and caused the grant to be declared forfeited by the Legislature of Wisconsin and transferred to itself.

Second.—The act of the Legislature of Wisconsin of Feb. 16, 18 2, revoking the grant to the Portage Company, and the act of March 7, 1883, confirming the revocation, are to be treated as nullities in a Court of Equity, because by their enactment the grantor prevented the grantee from complying with the condition of the grant.

Third.—The said acts of the Legislature of Wisconsin are null and void, because their effect, if valid, would be to impair the obligation of the contract between the State and the Portage Company.

Fourth.—It is contended that, if the act of February 16th, 1882, annulling the grant to the Portage Company before condition broken and transferring it to the Omaha Company, be invalid because in violation of the obligation of a contract, yet that objection does not apply to the act of March 5th, 1883, which confirmed the former act, after the time limited for completion had expired.

(a.) Forfeitures are not favored by the Courts; and therefore defects in acts of forfeiture will not be cured by friendly interpretation. Hence, as the former act was a mere nullity, a Court should give no effect to the second act, which does not declare a forfeiture, but merely attempts to "confirm" a nullity.

(b.) The unconstitutionality of the act of February 16th, 1882, arises from the fact that the State was bound by its contract to abstain from obstructing the Portage Company in building its land grant division. The declaration of forfeiture by the State destroyed the credit of the company and prevented it from complying with the condition of the grant, thus violating the contract. That act remained on the statute book a continuing obstruction and violation of the contract, and the act of March 5th, 1883, equally violated the contract and was therefore itself unconstitutional and void.

And by reason of the act of February 16th, 1882, there was no default on the part of the Portage Company, at the time the act of March 5th, 1883, was passed, nor, indeed, can there be any such default so long as either of said acts remain in force, and until a reasonable time thereafter. The case of Davis v. Gray, 16 Wall., 203, cited above is conclusive on this point.

Fifth.—We contend that the act declaring forfeited the grant to the Portage Company and conferring it on the Omaha Company, is in contemplation of law a nullity. It follows that the Omaha Company was not a party to the grant, though it performed the condition. But as the sole stockholder and principal creditor of the Portage Company, it had a greater interest than all other persons or corporations in having the condition performed. The law avoids forfeitures where practicable, and therefore declares that: "Any one who is interested in a condition may perform it; and when once performed it is gone forever."

2 Crabbe Real Prop., 815
(Law Lib. Ed., sec. 2163, p. 537).
2d Wash. Real Prop. (2nd ed.) p. 12.
Vermont v. Society, 2 Paine C. C., 546.
Marks v. Marks, 10 Mad., 19.

The first one of these I shall argue at considerable length. But for want of time I must content myself with a mere statement of the other four. My learned associate I hope will have time, as he can, to more than supply my deficiencies. Besides, I must restrain myself in order that I may properly present some other very important points bearing on this case which were not considered, or discussed at all by the learned Justice who rendered the decree in the Court below.

Story's Eq., § 103.
Chesterfield Case, 2 Vesey, Sen. 125, 155.
Cary v. *Brown*, 92 U. S., 171, 174, 175.
Farmers' L. & T. Co. v. *Chi. P. & S. Ry.*, 39 Fed. Rep., 143.
Cooley's Con. Lim., p. 111. 4th Ed.
Newland v. *Marsh*, 19 Ill., 376, 382.
Fletcher & Peck, 6 Cranch, 87, 130, 131.
Jones v. *Jones*, 12 Pa. Rep., 350, 357.
Wright v. *Defrees*, 8 Ind., 298, 303.
Johnson v. *Higgins*, 3 Met. (Ky.) Rep., 567–576.
McCardle's Case, 7 Wal., 506, 514.
Doyle's Case, 94 U. S., 535.
Soon Hing's Case, 113 U. S., 703, 710.
Aldrich v. *Williams*, 3, How., 24.
Maynard v. *Hill*, 125 U. S., 190, 209.
Sunbury & Erie Ry. v. *Cooper*, 33 Pa. Rep., 278, 283.
Grove's Heirs v. *Fulsome*, 16 Mo., 543.
Lewis v. *Lewis*, 9 Mo., 182.
Bird v. *Bird*, 1 Mo., 398.
Lindsey v. *Hawes*, 2 Black, 554.
Rogers v. *Brent*, 10 Ill., 572, 580.
Garland v. *Wynn*, 20 How., 6.
Stark v. *Storrs*, 6 Wal., 402, 419.
White v. *Cannon*, 6 Wal., 443.
Plank R. Co. v. *Woodhull*, 25 Mich., 103, 112. J. Hadan's opinion, p. 5.

***Davis* v. *Gray*, 16 Wall, 203.**
2 Crabb, Real prop., 815.
2 Wash, Real prop., 2d Ed., p. 12.
***Vermont* v. *Society*, 2 Prin C[illegible]**
***Marks* v. *Marks*, 10 Mad., 1[illegible]**

Assignment of Errors.

I.

The court below erred in sustaining the demurrer.

II.

The court below erred in dismissing the bill for want of equity.

The grounds of error appear more fully in the following.

Points and Argument.

Before entering upon the discussion of the points decided by the court below, we maintain:

There are several vital points in this case which were not considered at all, by the learned justice who rendered the decision in that court. It is due, however, to him, to this court and to ourselves, to say:

His opinion (Rec., 67), passed upon only one question in this case; and, the decision of that one was based upon reasons stated in an opinion given in another case, viz:—in a suit by the Farmers Loan and Trust Company, to foreclose a mortgage on the land grant executed by the Portage company.

39 Fed. Rep., 143.

That one point upon which he ruled against us was this. That the Portage company "*has no interest in said*

"*lands which can be subjected in satisfaction of the above* "*judgment against it.*" (Rec., 67.)

But the prayer of our bill, is general. It prays not only for that relief, but for "such *other and further re-* "*lief* as equity and good conscience may require." (Rec., 19.)

Upon the case stated in our bill and admitted by the demurrer, there are several good grounds for relief against the Omaha company, in our opinion; and which are controlling in this case, even if that company had never sought and never had obtained an acre of the land in question by legislative grant.

Before entering upon a discussion of the points made by the learned judge, I will state some of them:

I.

THE BILL CHARGES, AND IT STANDS ADMITTED BY THE DEMURRER:

While the Portage company was the nominal defendant in the suit at law, the Omaha company was the real defendant in interest; and is therefore, in equity bound to pay the judgment, WHETHER IT ACQUIRED THE LAND GRANT OR NOT.

Courts at law often take notice of, in order to protect and enforce, the rights and duties of real parties in interest, whether plaintiffs or defendants, even against the nominal parties to the record.

In *Sumner* v. *Sleeth*, 87 Ill., 500, 503, Justice DICKEY says: "It has long been the practice of courts of law "to look through the nominal parties to the rights of "the real parties in interest; and that against the pro- "test of the nominal parties."

II.

THE BILL ALLEGES, AND IT STANDS ADMITTED BY THE DEMURRER:

That the Omaha company as purchaser under, and assignee of, and successor to all the valid stock, rights, franchises, including the land grant of the Portage company, and assuming as such to stand in its shoes, and to act for it, made the breach of the contract for which this suit was brought, and the judgment recovered on the law side of this court. Therefore the Omaha company is in equity bound to pay the judgment which it caused against the Portage company.

As between the Omaha company, the Portage company, and Angle, the Omaha company is estopped from denying that it claimed the right to control the acts of the Portage company by purchase. It is estopped from denying that its act in preventing Angle from completing the railway was claimed to be done in its own right, and for its own interest. Therefore, in equity, it would be responsible over to the Portage company, and also to Angle; and this, without reference to whether it ever acquired the lands by legislative grant or not.

It is no answer to say: the contract under which it claimed to purchase, (Ex. L, pages 52–57) was void as against public policy, on account of its bribery clauses, because Angle was no party to that agreement. It was aimed to destroy him.

It is estopped also from saying that it did not claim to be a purchaser of the Portage company, and of its interest in the land grant under the contract contem-

plated in Exhibit K. (Rec., 50) and contained in Exhibit L. (pages 52–7.)

It is no answer to say: the Supreme court of Wisconsin have held the contract set out in Exhibit K. between the Omaha company, the Milwaukee and St. Paul company, and the Chippewa Valley company, agreeing to divide the spoils of the Portage company, and to help the Omaha company get the grant from the legislature, void, as against public policy.

See,

Chip. Val. R. R. v. *Omaha Co.*, 75 Wis., 224, 232, 241, 251.

That contract was held to be void as between the parties to it, because it was a lobby contract and against public policy.

The precise ground upon which the Wisconsin Supreme Court declared that contract void, was a clause in it which bound the Chicago, Milwaukee and St. Paul and Chippewa Valley companies "not to aid any other "party to procure the land grant except the Omaha com- "pany," *and* "*to render all reasonable and proper assist- "ance which they may be able to give in procuring said "land grant to be given to the Omaha company.*"

This clause alone rendered the contract for division of spoils, *void as against public policy.* (It seems the Omaha company had no scruples to set up this defense against dividing the spoils as agreed upon.) But for this clause alone the court would undoubtedly have compelled the Omaha company to divide with the Chippewa Valley company in the ratio of 1 to 3.

Angle was no party to that contract; and he has a perfect right to insist upon it as incontrovertible evi-

dence of the deliberate purpose of the Omaha company to wreck the Portage company, and to break down and defraud its innocent contractor; a purpose to purchase the control of the Portage company, and thereby to put it out of Angle's power to complete his contract, and thus forfeit the land grant.

III.

The bill alleges, and the demurrer admits, that *the Omaha company* as such assignee of the Portage company, *not only caused the Portage company to break the contract with Angle, so as to put it out of his power to complete the railway and earn the land grant for the Portage company; but as such assignee, and standing in its shoes, it went further; it falsely and fraudulently procured an injunction in the Circuit Court of Cook county, Illinois, whereby, after Angle was compelled to stop in his work, it went further and restrained the Portage company from employing anybody else, to complete the railway, and from earning the land grant in any other way, or by any other means whatever.* (Rec., 15.)

We submit, therefore, that the Omaha company, upon the facts admitted on this record, would have been directly liable over (upon its injunction bond, if one was given, or if one was not given), it would be still liable over to the Portage company, in that injunction case, in damages for the entire value of its interest in the land grant—an amount far exceeding the amount of the judgment in this case.

SUCH LIABILITY OVER, OF THE OMAHA COMPANY TO THE PORTAGE COMPANY IS AN EQUITABLE ASSET, TO BE REACHED BY CREDITOR'S BILL UPON A JUDGMENT AGAINST THE PORTAGE COMPANY.

Beyond question, therefore, the Omaha company should be decreed to pay the judgment.

IV.

The Portage company could have recovered upon the facts alleged in the bill in an action at law on the case against the Omaha company, which, with a view to its own pecuniary advantage, had, by fraud, prevented the Portage company from earning the land grant.

It could have waived the tort and brought assumpsit for the value of its interest.

2 Greenleaf Ev., 108, Note 3.
Putnam v. *Wise*, 1 Hill, 234, and Note A.
Linhtley v. *Couston*, 1 Taunton, 112.

Such right of action is an asset of the Portage company, liable to be reached by creditor's bill. It is of more value than the judgment; therefore, the Omaha company should be decreed to pay this judgment.

V.

The Omaha company, after its alleged purchase, claimed to be the master, or superior of the Portage company.

As such, it compelled the agents of the Portage company to break its contract and discharge Angle from the work. When suit was brought by Angle for the breach, the Omaha company, as defendant in interest, appeared

as such master in court, to defend its servant for obeying the orders of its superior; as such master and superior, the Omaha company is bound by the amount recovered as the true measure of damages as between it and its servant, and as between it and Angle, it is also bound as such master to respond, and to pay the judgment. It is estopped from saying that the act of preventing Angle from completing his contract *was tortious*, and, therefore, the Portage company would have no right of action over against a joint tort feasor to pay the judgment against it. However that might be, that right of action over would clearly be an equitable asset to be reached by creditor's bill; therefore, in conscience, the court in equity must say the Omaha company should be decreed to pay the judgment against the Portage company.

V I.

There was "fraud and damage coupled together," in the act of the Omaha company against Angle, as well as against the Portage company. It was directly injurious to him as well as to the Portgage company, whereby an unconscientious advantage wastaken of him by the Omaha company. Equity has always had jurisdiction of a fraud like this.

Story's Eq., Sec. 203.
2 Vesey, Sen. 125-155.

Of fraud and its effect in equity.

We respectfully submit the two most important rules laid down by Perry on Trusts, are as follows:

FIRST.

COURTS OF EQUITY WILL NOT ONLY INTERFERE IN CASES OF FRAUD TO SET ASIDE ACTS DONE, BUT THEY WILL ALSO, IF ACTS HAVE, BY FRAUD, BEEN PREVENTED FROM BEING DONE, INTERFERE AND TREAT THE CASE EXACTLY AS IF THE ACTS HAD BEEN DONE; AND, THIS THEY WILL DO BY CONVERTING THE PARTY WHO HAS COMMITTED THE FRAUD, AND PROFITED BY IT, INTO A TRUSTEE FOR THE PARTY IN WHOSE FAVOR THE ACT WOULD OTHERWISE HAVE BEEN DONE. (Perry on Trusts, Sec. 181.)

SECOND.

IF A PERSON BY HIS FRAUDULENT CONDUCT, WITH A VIEW TO HIS OWN PROFIT, PREVENTS A DEED OR WILL BEING MADE IN FAVOR OF A THIRD PERSON, AND THE PROPERTY INTENDED FOR SUCH THIRD PERSON AFTERWARD COMES TO HIM WHO FRADULENTLY PREVENTED THE EXECUTION OF THE WILL OR DEED, HE WILL BE HELD TO BE A TRUSTEE FOR THE PERSON DEFRAUDED TO THE EXTENT OF THE INTEREST INTENDED FOR HIM. (Perry on Trusts, Sec. 181.)

I have not entered at all upon the discussion of the question whether the condition of the grant to the Portage company is *precedent or subsequent;* whether it had a simple right to *purchase* or a right to *redeem*; because that right was a right of great value, whether the one or the other; and, because that right was taken away or destroyed by the fraud; the clear, undisputed, *admitted fraud of the Omaha company.* If that point should be taken by the counsel on the other side, my learned associate, will fully answer it in reply.

I repeat: Whether it was a right to *earn*, or a right to *redeem*, it was worth more than $2,000,000. The land grant, as charged in the bill and admitted by the demurrer, is worth $4,000,000. It could not cost over *$1,500,000* to build the sixty-five miles of railway. *$2,500,000*, then, is the least sum at which the right of the Portage company could be appraised, whether a right to earn or a right to redeem the land grant. By clearly admitted, premeditated, *cold-blooded conspiracy* and FRAUD, the Omaha company broke down the Portage company and its contractor, caused the grant to be forfeited, and wholly lost by the Portage company.

In presence of such a case, we but adopt the language of this court, (in *Cary* v. *Brown*, 92 U. S., 171, 174,) when we say: "The doctrine of *conditions precedent* "can have no application, because *sterner* principles in-"tervene and become factors in the determination of "the case." "A case of clearer equity on one side and "of iniquity on the other is rarely presented for the con-"sideration of a court of justice." (Same, p. 175.)

Let us state a case parallel to this, but between private parties only; and a case which clearly depends upon a condition *precedent*.

Suppose A contracts to purchase of C a valuable real estate, worth $30,000, which C, for reasons satisfactory to himself, being about to leave the country, perhaps, agrees to sell to A for $10,000, one-third of its real value; but *upon the express condition that A will pay him in gold coin, at his residence in ten days.* Time is expressly made the essence of the contract. Unless the money is paid on the day named, the contract is to be null and void. Here is a clear case of condition pre-

cedent. If A fail to pay the money on the day, al right, title, interest or claim to the land, at law or in equity, ceases.

But go a step further. Suppose that B becomes informed of this contract between A and C, and that he at once enters into conspiracy and employs agents to prevent A by force or by fraud from fulfilling *the condition precedent*, and thus to cause A to lose the benefit of his contract, which, if he fulfill it, is really worth to him the sum of $20,000. B further conspires by falsehood and fraud to impose upon C, and to induce him to cancel his contract with A, and to deed the very land to himself. Meanwhile A in good faith, relying upon his contract, makes all arrangements and raises the money, and places it in the hands of a trusted agent to deliver to C, in due time to take the deed according to the conditions of his contract. B, however, meets this agent on the way, and bribes him to betray his trust, and to withhold the money beyond the time agreed upon. Not content with that, B goes directly to C himself, and falsely tells him that A has failed to raise the money; that A has abandoned all hope, and effort to comply with his contract to pay the money and take the deed; and further falsely represents, that A has requested, as he cannot comply with the contract, that C shall sell and convey the land to B, as his friend. He even goes so far as to say he need not wait till the ten days have expired. C, being thus innocently imposed upon, and deceived by these false representations of B, at once, accepts $10,000 from B and deeds to him the land.

That is precisely on all-fours as this case would stand between private parties.

In the presence of these facts, what would a COURT OF

EQUITY SAY? Would it suffer itself to be entangled in a discussion of *conditions precedent* and *conditions subsequent?* Would its conscience be caught in the cobwebs of legal subtilties and hair-splitting distinctions upon that question? No, indeed! No! When shocked, as it must be, by such outrageous wrong, by such fraud, falsehood and treachery—more wicked in the sight of heaven than bold highway robbery itself, would it go back to the year books for definitions of conditions precedent, or conditions subsequent? Would it not, rather, speak right out, and speak from the lowest depths of its conscience in condemnation of the wrong and outrage?

What would the great judges say? Hale or Mansfield? Marshall, Story or Grier? What would those great men say? Men—in whom "enthusiasm for justice" was of the very essence of their natures;—men, whose greatness was just in proportion to the simplicity of their soul reasonings;—just in proportion to the intensity of, and their fidelity to, the instincts of Conscience—that voice of God within—which moves the righteous indignation of every great soul against every form of fraud, falsehood, treachery, injustice and robbery. In presence of a case like this, in my opinion, with one voice, they would all say: No matter whether the condition is precedent, or subsequent; no matter whether it was a right to *earn* or a right to *redeem the land grant;* it was worth at least $2,000,000, besides all it would cost to build the railway. By conspiracy, falsehood, treachery and bribery, the Omaha company was enabled, like a huge boa constrictor, deliberately to seize upon, break down, and swallow up the Portage company, and to break down and crush the very life out of Angle, the innocent contractor, for the double purpose *first*, to

destroy a rival and competing railway; *second*, to wrongfully obtain its land grant. That land grant which was worth $4,000,000—which, in equity *belonged to* the Portage company, or which it had the right *to earn*, and then was earning in perfect good faith. *The Omaha Company has it now.* It is still gorged with the spoils. The wrong doer is still in the very act, *flagrante delicto.*

May it please the court, in the presence of this cold-blooded conspiracy to wreck the Portage company and to destroy or to steal its land grant, I know not what the great chief justice who gave the opinion in *Fletcher* v. *Peck* would have said. But from my long personal and intimate acquaintance with Justice Grier, having for years slept under the same roof and eaten at the same table, I can well say I think I know what he would say in a case like this. From the very depths of his conscience, with all the intensity of his great soul, a few short, burning Anglo-Saxon words would express the rule which equity would apply to this case: "STOP "THIEF; GIVE BACK THE SPOILS."

And in saying that, he would only give utterance to the stern principle applicable to a case of robbery like this,—to that moral mandate spoken by the Almighty, "midst the thunderings and the lightnings" on Mt. Sinai, three thousand years ago—a mandate which is ringing through the centuries yet, and will ring to the end of time—"THOU SHALT NOT STEAL."

That is the stern principle which intervenes and becomes the main factor in the determination of this case.

So much upon vital points in this case, not considered or passed upon by the court below.

VII.

MAY IT PLEASE THE COURT:

Let us now carefully consider the main points discussed in the opinion of that court. (See at length 39 Fed. Rep., 143.)

The learned justice held: *First:* that although the act of February, 1882, forfeiting the grant to the Portage company was unconstitutional, and although that act broke down and destroyed the credit of the Portage company it did not make it *legally impossible* for the Portage company to complete the railway in time to earn the grant.

The learned judge, it seems to me, overlooked one most important fact altogether; a fact, which in my opinion, made it both *legally and physically impossible.* The bill alleges and the demurrer admits, the Omaha company, by its agent and trustee, filed a bill claiming to have purchased all the stock, franchises and the land grant of the Portage company and sued out an injunction, and thereby, it RESTRAINED THE OFFICERS OF THE PORTAGE COMPANY FROM DOING ANY ACT WHATEVER. IT THEREBY COMPELLED THE PORTAGE COMPANY TO SUSPEND ALL WORK AND CEASE TO BUILD THE RAILWAY. (Rec., 15.)

That injunction made it *legally and physically impossible* to complete the railway in time.

It is no answer to say: the Portage company could have moved to dissolve that injunction. *The Omaha company which fraudulently procured that injunction is estopped from setting up that answer in a court of equity.*

He held: *Second:* That the validity of a public act

of the legislature could not be affected by the fact, that the legislature was influenced or misled by false representations ; and the court had no power to try the question as to what motives influenced the legislature.

With all respect, let us say : we have never contended that the court could try the question of legislative motives.

What we do contend for is this : that even if the title passed to the Omaha company by the Act of March, 1883, it passed affected with a trust, because of the fraud, bribery and corruption which was practiced *not upon the legislature to obtain the grant to the Omaha company in March*, 1883 *; but before that time practiced upon the Portage company, and upon Angle, its innocent creditor*, by which it hindered and prevented the fulfillment of the condition—the completion of the railway—in time to save the grant from any forfeiture at all.

What we do maintain is, that the bribery, corruption and fraud practiced by the Omaha company on the Portage company and on Angle, directly caused and compelled the forfeiture of the grant by the Portage company. It directly prevented Angle from completing the railway, and by its fraudulent injunction it

directly prevented its completion by any other means, in time to save the grant from being forfeited. Therefore the lands are thereby subjected to a trust. That is our contention.

The learned judge seemed erroneously to think that the judiciary would improperly interfere with and in some way set aside the act of the legislature, when it would not set aside the act at all; but would simply try and decide a question of *private right* growing out of fraud practiced by one *private party* upon another. That is most clearly a *judicial question and one which the legislature has no power to try at all.*

To illustrate: instead of a question of fraud, put the question in another form, as a question arising upon contract.

Assuming all the facts of this case to be true, with the fraud left out; assuming that on the 10th day of January, 1882, the Omaha company agreed with the Chicago, Milwaukee and St. Paul and Chippewa Valley railways to obtain this land grant, either by a grant of the legislature, or by negotiation with the Portage company, or by both; assuming that Angle was then building the railway to earn the grant for the Portage company, and under his contract was a creditor of the Portage company, and had until the 5th of the next May to complete his work; that he had already so far progressed under his contract that it was assured that he would complete the railway by May 5, 1882, (the jury found he would have completed the work in time, and was entitled to more than $200,000 to make him good for his damages for the breach of the contract); assuming that as a creditor Angle looked, and had a right to look, to the interest of the Portage company in the grant to secure

his pay, as, by the terms of his agreement, he was to receive $5,000 in the stock of the company per mile, and $8,500 in cash. The value of that stock and the ability to make the cash payment, all depended upon the ability of the Portage company, with his aid, to earn the land grant in time, which he was able to do, and would have done if not hindered by the act of the Omaha company; and, that the land grant was then worth four millions, or twice what it would cost to build the railway.

Assume that all these facts as alleged in the bill are true; and, then, suppose the Omaha company, instead of trying to defraud, had in good faith agreed with Angle, in case it should by negotiation with the Portage company, or by grant of the legislature, legally obtain the land grant, that it would pay him $250,000 for the damages he would sustain by the surrender of his contract with the Portage company. Could there be a doubt that such agreement would be binding, both at law and in equity, as between Angle and the Omaha company?

It would amount simply to a *bona fide* conditional sale; the sale of an interest already existing, already earned under his contract with the Portage company. It would be a simple transfer of what he had already earned. I repeat, should the Omaha company afterwards lawfully obtain the land grant, and then refuse to pay him the amount agreed upon; is it conceivable that any court would refuse its aid to enforce the agreement?

I cannot believe the learned justice who decided this case would find anything in *Fletcher* v. *Peck*, or any of the other cases cited by him, to restrain a court from doing equity between the parties, because it happened

that the land grant was made to the Omaha company by an act of the legislature.

The rights of parties to such a contract would be vested rights; and raise a *judicial question pure and simple;* a question which the legislature would have no constitutional power to decide; a question which would belong only to the judicial department to try and determine. To borrow the language of a great writer:

"The legislative power extends only to the making of "laws, and in its exercise, it is limited and restrained "by the paramount authority of the federal and state "constitutions. It cannot directly reach the property "or vested rights of the citizen by providing for their "forfeiture or transfer to another, without trial and "judgment in the courts; for to do so would be the ex- "ercise of a power which belongs to another branch of "the government, and is forbidden to the legislature."

Cooley's Con. Lim., p. 111, 4th Ed.
Newland v. *Marsh*, 19 Ill., 376, 382.

Whether property rights grow out of a contract, or whether they grow out of a trespass, or grow out of fraud they *are equally fixed and vested rights;* which the legislature has no power to impair or take away without just compensation, even for public use, and which can only only be determined and enforced by the judicial department of the government.

The legislature has no more power to set aside a fraud committed by one party against another, or to set aside the *rights, trusts and equities growing out of that fraud,* than it has to impair the obligation of a contract; or, to take one man's property to give it to another. Legislative power to set aside a fraud or confirm a fraud, is express-

denied by the Supreme court of New Hampsire, in the case of

White M. R. v. *White M. R.*, 50 N. H. Rep., 50.

It could no more confirm a fraud than authorize one beforehand.

May it please the Court: Let us now make a careful examination of all the cases cited by the learned judge, beginning with the leading case of *Fletcher* v. *Peck*, 6 Cranch, 87, and I think we shall see there is nothing to conflict with our positions on this question.

The action brought by Fletcher against Peck was upon a covenant, that all the title which the State of Georgia ever had in certain lands, had been legally conveyed to John Peck, the grantor; and the count assigned as a breach, that the law of Georgia making the grant to the original grantees was a nullity, because divers members of the legislature were promised "if they would assent "to, and vote for it, they should have a share in all the "lands purchased from the state by virtue of such law;" and that divers of the said members to whom the said promises were made were unduly influenced thereby, and under such influence did vote for the passing of said bill. The plea to this count, after protesting that the promises it alleges were not made, avers that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf nor the said Peck, nor any of the mesne vendors between the said Greenleaf and the said Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legisla-

ture of the state of Georgia. To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

Two points were distinctly raised: First, whether a court could try the question whether a majority of the legislature, or any number, less than a majority, acted from impure motives; and secondly, if they did so, and passed an act regular upon its face through corrupt motives, whether a *bona fide* purchaser, without notice, would be effected by such fact.

It was upon these points that Chief Justice MARSHALL delivered the opinion of the court, in which he said: "It may well be doubted how far the validity of a "law depends upon the motives of its framers, and how "far the particular inducements, operating on members "of the supreme sovereign power of a state, to the "formation of a contract by that power, are examinable "in a court of justice." * * *

"This is not a bill brought by the State of Georgia, "to annul the contract, nor does it appear to the court, "by this count, that the State of Georgia is dissatisfied "with the sale that has been made. The case, as made "out in the pleadings, is simply this: One individual "who holds lands in the State of Georgia, under a deed "covenanting that the title of Georgia was in the "grantor, brings an action of covenant upon this deed, "and assigns, as a breach, that some of the members of "the legislature were induced to vote in favor of the "law, which constituted the contract, by being promised "an interest in it, and that therefore the act is a mere "nullity.

"This solemn question cannot be brought thus col-"laterally and incidentally before the court. It would

"be indecent, in the extreme, upon a private contract, "between two individuals, to enter into an inquiry "respecting the corruption of the sovereign power of a "State. If the title be plainly deduced from a legisla- "tive act, which the legislature might constitutionally "pass, if the act be clothed with all the requisite forms "of a law, a court, sitting as a court of law, cannot sus- "tain a suit brought by one individual against another "founded on the allegation that the act is a nullity, in "consequence of the *impure motives* which influenced "certain members of the legislature which passed the "law." (Pages 130, 131.)

This is the reasoning upon which the court sustained the demurrer to the plea.

We have thus stated, at some length, the points raised, and the points decided, in that great leading case. So far as it bears upon the case at bar, the only point clearly decided and about which no question can be raised, is this: That in a suit between individuals, neither party in a court of justice, can be heard to question the purity of the motives of the members of a legislative body.

It is enough to say we do not attempt any such thing. We expressly disclaim any such purpose. The motives of a legislative body can no more be examined into by another and distinct department of the government, than can the motives of the courts of one state, in entering a decree or judgment, be raised or questioned in the court of another state. Full faith and credit is to be given to the records of every court of the United States, in every other, both by comity, by the plainest principles of reason, and by the express provision of the constitution of the United States.

But to return to the case above supposed: If Angle had, in good faith, sold out his building contract to the Omaha company, in case it could lawfully obtain the grant by negotiation with his employer, or by a legal act, could it raise any possible question upon the motives or wisdom of the legislature in passing the act for a court to enforce the contract? Would suit to recover the price agreed upon raise any question as to the motives or wisdom or conduct of the legislature making the grant? Would it not be pure and simple, a judicial question between private parties, whether the Omaha company should pay what it had agreed to pay, for giving up a valid and valuable contract? Surely, this court would feel obliged to enforce the contract, and compel the parties to carry out its provisions in perfect good faith.

We have already seen; the Supreme court of Wisconsin, in (*Chip. Val. R. R.* v. *Omaha Co.*, 75 Wis., 224) held this very contract set out in this case (Exhibit K, Rec., 50-52) between the Omaha company, The Chicago, Milwaukee and St. Paul and Chippewa Valley railways for a division of the spoils of the Portage company to be valid; except for the reason that those companies in the same contract agreed "not to assist any "other party but the Omaha company to obtain from "the Legislature the grant," "and would assist the "Omaha company." It was that clause alone, binding them to use *Lobby Influence* which avoided the contract. Without that, it would have been upheld and enforced.

But, to return once more to the case of *Fletcher* v. *Peck*.

Suppose Gunn, the original grantee of Georgia, had, under some previous law, made a legal pre-emption upon

the lands, and made large improvements; suppose he had agreed to sell out and convey them to Peck as soon as he could legally obtain title thereto, by a grant of the legislature, would it raise any question upon the motives of the legislature if a court should decree a specific performance of the agreement made before the passage of the act between Gunn and Peck? The court would assume the act to be valid, and proper as a public act. The only question the court would be called upon to pass upon would be the equities between the private parties to the contract.

Go one step further: Suppose Peck, after making such a contract with Gunn, and while the matter was pending before the legislature, should represent to the legislature or its committees, that Gunn had consented to have the grant made directly to Peck, instead of to himself, and the legislature, in good faith, acting upon that statement, should make the grant to Peck — then suppose Peck, after all this, should repudiate his agreement, and refuse to pay Gunn for his pre-emption and improvements, would it in any manner show a want of respect, courtesy or delicacy, towards another department of the government, or in any manner interfere with it, for a court of justice to hear the equities between the parties, arising upon this contract and to decree that Peck should fulfill his contract and pay Gunn what he had agreed to pay for his land and improvements?

Could that in any way call in question the motives or the good judgment, or the wisdom, independence or dignity of the legislature, which innocently and in good faith, made the grant?

Suppose, again, that by a clear fraud practiced by Peck upon Gunn, Peck had obtained from him a release

of his contract, and that Gunn, after a discovery of the fraud, should go into a court of equity and ask to set aside the release thus obtained by fraud, and for a decree that Peck should fulfill and pay the amount agreed upon; would there, or could there, be involved any question as to the right or propriety of a court taking jurisdiction of these private parties to the contract, and of doing equity between them? It seems to us, almost too plain to admit of doubt or discussion.

So much for *Fletcher* v. *Peck*.

Let us now proceed briefly to examine the other cases cited.

In *Jones* v. *Jones*, a divorce case, (12 Pa., 3503-57), it was held that "it would be unbecoming and dis-"courteous to the legislative body to admit evidence," showing that one of the members of the legislature was guilty of falsehood; and, that a divorce was obtained by his fraud or falsehood.

In *Wright* v. *Defrees* (8 Ind., 298-303), the court said: "It is now proposed that one of the three powers of "government shall institute an inquiry into the conduct "of another department, and form an issue to try by "what motives the legislature was governed in the enact-"ment of the law. If this may be done, we may also inquire "by what motives the executive is induced to approve a "bill or withhold its approval; or, in case of withhold-"ing it corruptly, by our mandate compel its approval. "To institute the proposed inquiry, would be a direct "attack upon the independence of the legislature, and "the usurpation of power subversive of the constitution."

In *Johnson* v. *Higgins*, (3 Metcalf (Ky.) Rpts., 567-576.) The court said: "Something has been said as to the

" motives and necessities which may have superinduced " the enactment of the law. Of these matters it becomes " us not to speak. Such inquiries relate not to the con- " stitutionality of the law, but to its policy, and pertain " properly to the legislative and not to the judicial " department of the government."

In McCardle's case (7 Wal., 506-514). C. Justice CHASE said: " We are not at liberty to inquire into the mo- " tives of the legislature."

In Doyle's case, (94 U. S., 535.) C. Justice FIELD said: " It is quite out of the power of any court to inquire " what was the intention of those who enacted the law."

In Soon Hing's case, (113 U. S., 703-710), Justice FIELD again said: " Courts cannot inquire into the motives " of legislators. The diverse character of such motives, " and the impossibility of penetrating into the hearts of " men, and ascertaining the truth, precludes all such " inquiries as impracticable and futile."

In *Aldrich* v. *Williams* (3 Howard, 24), C. J. TANEY said: " The court cannot in any degree be influenced by the " construction placed upon the law by individual mem- " bers of Congress in the debate which took place upon " its passage, nor by the motives or reasons assigned by " them."

In *Maynard* v. *Hill*, (125 U. S. Rep., 190-209), Justice FIELD said: " If within the competency of the legislative " assembly of the territory we cannot inquire into its " motives in passing the act granting the divorce; its will " was a sufficient reason for its action."

In the *Sunbury & Erie R. R. Co.* v. *Cooper* (33 Pa. S. Rep., 278-283), it was contended that an act of the legislature " was a fraud upon the people."

Judge LOWRIE said: "Is this the proper tribunal to "try such a question? May the judiciary sit in judg- "ment upon a charge that the legislature have been "faithless to their oaths, to the constitution and to the "public interests, by passing a law that is a fraud upon "the state? We cannot hesitate a moment on this "question. We have no such authority and ought not "to have."

But the learned judge in that case goes on to say: "We do not say, that a party who has obtained the "passage of a private act of assembly by bribery, imposi- "tion or other fraudulent means can claim any benefit "from it, if the fraud be shown; perhaps this would be "treated in the same manner as a judgment in court, or "a title from the land office obtained by fraud."

And right here, in passing, let me say: whether the law passed is a *private* act, which must be pleaded and proved in court, or a *public* act which all courts are bound to take notice of, it makes no difference in princi- ple. Under all our American constitutions, state or federal, where one has private rights growing out of a contract, or growing out of a trespass, or growing out of a fraud practiced upon him by a private party, neither Congress nor any state legislature has power *by private or by public act*, to take away or destroy such vested right. Herein lies the great distinction between the powers of parliament in Great Britain, *which are not limited by a written constitution*, and which, as Black- stone says, are *unlimited and omnipotent*, and the powers of the legislatures of the United States and of the states in this Union, LIMITED BY WRITTEN CONSTITUTIONS.

It is the crowning glory of our American system that constitutions are written for the very purpose of limiting

the powers of govermnent; so they cannot encroach upon the rights and liberties and property of the individual citizen.

The Supreme Law of America says to a legislature: "Thou shall not take private property, even under the "power of eminent domain, though for public use, with- "out just compensation; neither by public nor by private "or special act." Such legislation is void, and the judiciary have so declared a thousand times over.

It is herein that the judiciary exercises the GREATER VETO POWER—A POWER AKIN TO THE TRIBUNICIAN POWER IN ROME—A VETO POWER OVER LEGISLATION FAR GREATER AND MORE IMPORTANT THAN THE VETO OF THE PRESIDENT.

The President's veto only requires a vote of two-thirds in both houses to overcome it. But the judicial veto is effective, though the law is passed unanimously by both houses. That old idea of the omnipotence and infallibility of the legislature is exploded. It is a myth.

And yet our courts in exercising this power, raise no question upon the purity of the motives, or the conduct or wisdom of a legislature, when they say, a legislature has no constitutional power to impair or take away private vested rights; or, when they say that a legislature may be imposed upon by fraud and falsehood just as easily as the judicial department or other officers of the government. Are the members of legislative bodies, separately or collectively, more or less than men? Are they clothed with more infallibility and sanctity than the judiciary department?

It has been my lot in years gone by to be called upon to exercise both judicial and legislative functions; and, in my humble opinion, based upon that experience,

the judicial department, clothed with *the power to hear and try both sides*, is less likely to be mistaken or imposed upon, as to the rights of private parties than the legislative department.

I put this case: Suppose this question of forfeiture, instead of pending before and to be decided by the legislature of Wisconsin, was pending before, and to be decided by this court; then suppose the Omaha company should conspire with and bribe the counsel for the Portage company to appear in this court and let a decree of of forfeiture go against it by consent or by default, and thus place the title in the guilty party, would a bill, filed by the Portage company, or by innocent creditors standing in its right, in a court having jurisdiction, to bring the Omaha company to account for its fraud, and for the direct and necessary damages sustained thereby, and thereby to charge it as trustee in its own wrong, call in question the motives, or the dignity, or the wisdom or the sacredness of this court, which being thus innocently imposed upon by the fraud of the Omaha company, made the decree?

Time and again, courts annul contracts of parties, if a single clause in them binds either party to exert *lobby influence* over legislative bodies; and yet in a clear case when the record shows, and *it is unblushingly admitted by the Omaha company* that by its fraud and direct bribery, it induced the officers and counsel of the Portage company (who were retained and paid as they lawfully might be, to appear for the Portage company) to go before committees of the legislature and corruptly and wickedly betray their sacred trust; in a bold case like that, the learned judge seems to shrink in apprehension, lest in some way, it would be improperly inter-

fering with another department of the government, *to see and to hear the admitted truth;* lest it would be discourteous for the court to do so in passing upon the question of private injury; a question, not as to the validity of the act nor as to the motives of the legislature; nor as to its legislative wisdom or dignity; but simply in passing upon a question of private injury and damage, viz: whether the Omaha company by falsehood, fraud and bribery, had for its own pecuniary advantage, directly and wilfully defrauded and damaged and destroyed the Portage company, and all its interest in the land grant, and did also break down and destroy its innocent contractor; *as it boldly admits upon the record, it did.* That is the question.

The learned judge says: no matter if the fraud and damage is admitted on the record by the Omaha company, this court is bound to say, *that the record is* to be *presumed to be a lie.*

Though in plain terms, the Omaha company admits on this record, that it did bribe the officers of the Portage company to betray their trust; that it did directly and wilfully cause the grant to be forfeited and lost by the Portage company to its great damage and utter ruin; that is a thing impossible; it is impossible also for a legislature to be innocently imposed upon. Though the record says such is the fact, the record does not speak the truth; away with the record. This is strange doctrine in the highest court of record, where records import absolute verity.

It has been, in many cases, state and federal, held that one obtaining a patent to land from the United States by fraud towards another, or who affects himself with a

trust, holds the title thus acquired for the benefit of those who have been injured by his conduct.

Groves' Heirs v. *Fulsome*, 16 Mo., 543.
Lewis v. *Lewis*, 9 Mo., 182.
Bird v. *Ward*, 1 Mo., 398.
Lindsey et al. v. *Hawes et al.*, 2 Black, 554.
Garland v. *Wynn*, 20 How., 6.
Stark v. *Starrs*, 6 Wall., 402, 419.
White v. *Cannon*, 6 Wall., 443.

Speaking for the Supreme court of Illinois, Justice CATON, one of the greatest American judges, in a very able opinion, says:

"A title derived from the government is no better "than one derived from an individual, and must be ad- "judged by the same rules of law; a fraud may be per- "petrated upon the government as well as upon indi- "viduals, in obtaining a title, and it is the duty of the "court to protect injured parties from the one as well "as the other. A fraud is none the less a fraud because "the officers of the government are imposed upon and "made the instruments of its perpetration." *Rogers* v. *Brent*, 10 Ill., 572, 580.

This is not only good law; it is good common sense, and this does not conflict at all with the opinion of Chief Justice MARSHALL, in *Fletcher* v. *Peck*, (6 Cranch, 131), when he says: "It would be indecent in the extreme "upon a private contract between two individuals, to "enter into an inquiry respecting the corruption of the "sovereign power of the state;" or, to show that an "act "is a nullity, in consequence of the impure motives "which influenced certain members of the legislature "which passed the law."

Neither does this view conflict, as we think, with the other case referred to by the learned justice in his opinion: *Plank Road Company* v. *Woodhull*, 25 Mich., 703, of which we propose also to give very briefly the exact points decided in the language of Judge COOLEY.

The point decided in that case was this:

There can be no appeal to the courts from the conclusions of the legislature *in matters within its jurisdiction*; and the act, if valid for any purpose must be conclusive. *But the legislature cannot pass finally upon questions of private right*, and upon that ground the court interposed its judicial veto in that very case upon the act of the legislature.

"We are constrained to say," says Judge Cooley, (p. 112, Christiancy & Campbell, concurring), "the deter-" mination whether a corporation has violated its charter " is *judicial* in its nature. It requires the action of those " tribunals which *must hear before they condemn, and must* " *proceed upon inquiry.*"

"If it were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen in this case, is otherwise, and the cases in which *presumptions are to be indulged against the facts*, ought not to be multiplied. It is sufficient to say, that in our opinion the case is one in which the party is entitled to a trial *of right in fact and cannot be put off with one which rests exclusively in a presumption of law, indulged against fact.* The violation of the charter cannot be made legally to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature."

The final conclusion reached was: "THE REPEALING " ACT, IT MUST BE PRESUMED, WAS PASSED THROUGH INAD-" VERTENCE."

We may be pardoned for quoting so much from the opinion of the court in this case; for, it is the only case

cited which at first blush would seem to sustain the extraordinary presumption upon which the learned judge, in making his decision in the court below, closed his eyes and refused to read the record of the admitted guilt of the Omaha company—a record of conspiracy, falsehood, fraud and bribery so outrageous that the learned judge himself, on the motion for a new trial, characterized it as a conspiracy in "COLD BLOOD TO BREAK DOWN "THIS CONTRACTOR, AND TO PREVENT HIM FROM COMPLET-"ING HIS CONTRACT." (J. Hadan's opinion, p. 5.)

We respectfully submit that this Michigan case, studied closely, supports our view. It holds with us that the legislature has no power to try the question of *private right* as between the parties. It holds that to be a judicial question which must be tried before "tribunals "which must hear before they condemn," and where if legal presumptions are to be indulged at all against the facts on the record, "it must be presumed that the "act of the legislature was passed through inadvert-"ence," and not that *the admitted record, upon which alone the court can pass on demurrer*, is to be presumed to be a falsehood.

In Conclusion.

May it Please the Court:

It is now nearly twelve years since Angle began this suit—ten years since he died—leaving ten long weary years of litigation to his widow and representative.

She still lives; and, hopes to see the end. But no one can tell all she has suffered by the "Law's Delay." Perhaps those well known lines of Spencer, come nearer telling it than any other, when he says:

> "Ah, little knowest thou, who hast not try'd
> What hell it is, in suing, long to bide;
> To lose good days, that might be better spent,
> To pass long nights, in pensive discontent;
> To speed to-day, to be put back to-morrow;
> To feed on hope, to pine with fear and sorrow;
> To fret thy soul with crosses and with care;
> To eat thy heart with comfortless despair."

And what makes her suffering keener still, at this long delay, is the thought that her antagonist—a great corporation, without flesh or blood, has no heart to feel a single pang. It is never sick, nor faint, nor tired; and, it never dies.

Though from the state of business in this court, and from causes beyond its control, justice, from necessity, is sometimes slow in coming, she feels sure it will come at last.

Respectfully submitted.

J. R. Doolittle.

Supreme Court of the United States.

October Term, 1893.

SARAH R. ANGLE AS ADMINISTRATRIX OF HORATIO G. ANGLE, DECEASED.

VS.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO., IMPLEADED, ETC.

Brief and Argument of Complainant's Solicitors.

The bill states concisely the facts relied on for relief, and we do not re-state the facts in the brief, but proceed at once to the discussion of questions of law arising on this appeal.

I.

The complainant has complied with every requirement, necessary on her part, to maintain the bill.

The record shows that the plaintiff has obtained a judgment of over $205,000 against the Portage Company and that the same is wholly unsatisfied; that the execution has been returned *nulla bona* and that the Portage Company is now utterly insolvent.

The plaintiff is in a situation to seek equitable relief,

either under the statute of Wisconsin, chapter 131, R. S., or on general principles of equity, and independently of the statute.

It will be seen from the allegations in the bill that there are peculiar equities which entitle the plaintiff, to pursue the property which we now seek to charge, as this judgment represents money, labor, and supplies which were invested to earn the very land grant which would have been secured for the benefit of the Portage Company and its creditors, but for the conspiracy on the part of its officers, and the Omaha Company, set forth in the bill.

II.

The interest of the Portage Company in the lands, described in the bill, was a right and interest in property which may be followed and reached in the hands of the Omaha Company by this proceeding.

It will doubtless be contended by counsel for the Omaha Company, that the Portage Company never had any interest in these lands legal, or equitiable which the courts would recognize. That if it ever did have any such interest, that interest was wholly lost and forfeited before this suit was commenced.

We are therefore forced to examine the question whether judgment creditors have any right to complain of those transactions set forth in the bill, by which the only fund available for the payment of their claims was absorbed by the Omaha Company.

(a.) The construction of the grant of 1856.

The act of June 3d, 1856, granting the lands to the state has been construed so many times by the court of last resort, as a grant *in presenti*, conveying a present interest in the lands designated that this can no longer be a subject of any doubt. The words of the statute import an immediate transfer of title, although subsequent proceedings might be required to give precision to that title and attach to it specific tracts.

Schulenberg vs. Harriman, 21, Wall., 44.
Railroad Land Co. vs. Courtright, 21 Wall., 310.

(b.) The effect of the grants from the state.

Doubtless counsel will concede the proposition last stated, but they will contend that the grant to the state was upon such conditions that the state had no right to dispose of the same in any way, except as sections of the road were completed. They will also contend that the grant of land by the state conferred in chapter 126 laws of 1874, conveyed no present or vested interest, because no portion of the road had been completed.

The language of section 8 chapter 126, laws of Wisconsin, for 1874, is, "*there is hereby granted* to the C. N. P. A. L. Co., all the right, title and interest, which the state of Wisconsin, *now has, or may hereafter acquire*, in or to that portion of the land granted to the state, by said two acts of congress, as is or can be made applicable to the construction of that part of the railroad of said company lying between," etc.

It is true there is coupled with this grant a condition that certain sections of the road shall be constructed within a given time. But some provision of this nature

is probably to be found in every railroad grant upon the statute books.

In a former argument involving similiar questions, counsel have contented that the state could grant no vested right or interest in the Portage Company, or any other company, to any of these lands until portions of the road had been built, and then only the land appertaining to those portions.

Such a theory is at variance with the legislative and judicial construction which has been given to similiar statutes for more than a generation. It is inconsistent with the whole theory on which these grants were made. No legislature or congress ever could have supposed that the states themselves would embark in the business of building railroads. Nor could it have been expected that railroad companies would incur the expenses of building railways through the wilderness, unless these grants from the state conferred upon them some valuable and vested right. Congress, the courts and the state legislatures have concurred in the view that these grants from the states to corporations conveyed a vested equitable right to the lands granted. The whole history of land grant legislation shows that in most cases the entire object of the grant would have been defeated if the rigid rule of construction now contended for had generally obtained.

We quote a few paragraphs on this subject from a brief prepared by General Thomas Ewing and used on another occasion.

"An examination of the statutes of the several states to which land has been given by congress to aid in the construction of railways subject to provisions respecting alienation exactly like these in section 4 of the act of June 3d, 1856, shows that in every instance the states

receiving the grants promptly transferred them to incorporated companies subject to the conditions imposed by congress.

"The fourth section of the act of June 3d, 1856, was incorporated by Congress *in haec verba* in ten acts of congress, passed in 1856 and 1857, granting lands to different states to aid in the construction of railways.

"Wisconsin—U. S. Statutes at large, Vol. II, p. 20; Iowa—U. S. Statutes at large, Vol. II, p. 10; Minnesota—U. S. Statutes at large, Vol. II, p. 196; Michigan—U. S. Statutes at large, Vol. II, p. 22; Mississippi—U. S. Statutes at large, Vol, II, p. 31; Alabama—U. S. Statutes at large, Vol. II, pp. 16, 18, 32 and 197; Florida—U. S. Statutes at large, Vol. II, p. 16; Louisiana—U. S. Statutes at large, Vol. II, p. 19.

"Each grant so made was promptly followed by an act or acts of the state legislatures, respectively, transferring the entire grant to some railway company, subject to all the conditions prescribed in the act of congress.

"Laws of Wisconsin, 1856, p. 217; Statutes of Iowa, revision of 1860, p. 215, act July 14, 1856; Minnesota, act May 22, 1857; Laws of Michigan, 1857, p. 346; Miscellaneous laws of Mississippi, 1857, December session, p. 104 and laws 1858, p. 118; Acts of Alabama, 1857–58, pp. 7, 8, 9 and 66; Laws of Florida, 1856, p. 9.

"And several such statutes expressly authorized the companies to which such grants were transferred, to mortgage all their rights thereunder, 'in possession, or expectancy,' to secure means to build such railways.

"Laws of Wisconsin, 1856, pp. 213 and 222; Statutes of Iowa, revision of 1860, p. 221; Minnesota, act May 22, 1857, sections 20 and 21.

"Thus section 4, of the act of 1856, incorporated in

ten nearly contemporaneous land grant acts of congress, was construed by all the states to which grants were made in 1856-7, as not prohibiting the transfer of the entire beneficial interest to railway companies; subject, of course, to all the conditions of the grant.

"This contemporaneous construction by the several states of the provisions in question was repeatedly approved by acts of congress recognizing the several companies to which said grants had been transferred as conditionally entitled to all the benefits thereof.

"Alabama—U. S. Statutes at large, vol. 11, p. 197; Wisconsin—U. S. Statutes at large, vol. 12, p. 618, and vol. 13, p. 67; Iowa—U. S. Statutes at large, vol. 13, pp. 95, 364 and 528; Minnesota—U. S. Statutes at large, vol. 12, p. 624; Michigan—U. S. Statutes at large, vol. 12, p. 620; vol. 13, pp. 409 and 520, and vol. 14, p. 78."

It has long been the settled law that the state accepted the legal title to lands granted by these acts; that the state became on acceptance, the trustee of the United States, bound to devote the lands to the accomplishment of the object of the grant, that is the construction of the railroads; and that as such trustee the state had a wide discretion as to the mode of securing the result.

That to accomplish the desired end, the state could convey its entire title to the company. In construing a similar grant from the state of Michigan, the court said "When the grant was made by the state to the company, the entire title before held by the former, passed to the latter. Nothing remained to the state but the performance of the remaining duties of the trust without any title, present or potential to the lands." *Tucker vs. Ferguson*, 22 Wall., 573.

Clearly the state could not deprive the United States

of its revertionary right in case of the default of the company. Nor would any patent or conveyance given by the state in any way impair this right; but from the very nature of these grants and the end sought, it could not have been the intent that the state could bestow no present or vested interest in these lands.

(c) The grant from the state not on condition precedent.

Counsel contend that the act of the Wisconsin legislature of March 4, 1874, was a grant on condition precedent; that no present estate ever vested in the company; that being a condition precedent, the failure to perform was an inevitable bar.

But there was no condition precedent in the act. The words "There is hereby granted, etc.," are words in the present tense, and import an immediate interest.

This is one of the distinctions between conditions precedent and conditions subsequent.

Again, the condition is one which could be performed as well after the vesting of the estate as before. This is one of the tests for distinguishing these estates. Applying this test we find that it would have been impossible to perform the conditions unless the company had some present and vested interest in the lands through which their road was to be constructed.

If there was any condition precedent in the act referred to, it is to be found in those provisions requiring the filing and acceptance of bonds; and the court will observe the wide distinction between the two conditions. In the one case the penalty for non-performance is explicit and summary.

The rule is well laid down in *Nicall vs. N. Y. & Erie Co.*, 12 N. Y.. 130, where the condition was expressed that the road should be constructed within a given time.

The court said, page 130: "The Hudson & Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition. This is apparent from the language employed in the grant and from the character of the transaction.

There are no technical words by which to distinguish between conditions precedent and subsequent. Whether a condition be one or the other is matter of construction and depends upon the intention of the party creating the estate.

4 Kent, 124.
1 Term R., 645.
2 Bos & Pull, 295.
3 Peters U. S. R., 346.

"In the latter case, MARSHALL, C. J., said: 'If the act (on which the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument the condition is subsequent.'

"In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible.

"From the character of the condition, it could not be a condition precedent. Possession and control of the

land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition. See also

5 Ham. Ohio Rep., 389.
9 East. R., 170.
5 Pick. R., 528.
18 Martin's, Louis, R., 221.
Co. Litt., 246, b.

"Kent says (4 Kent. 129.): 'Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates.'"

The rule is well stated by Chief Justice MARSHALL in *Findley vs. King's*, lessee, 3 Peters, 374–7, where the rule is declared that there are no technical words which determine the question, it being one of intention; that if the language shows that the act on which the estate depends, must be performed before the estate can vest, the condition is precedent. If on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent. The test is also recognized that words of present time, import an immediate estate.

Washburn on Real Prop., Vol. 2, p. 12, 5th ed.
Rogan vs. Walker, 1 Wis., 257.
Tiedeman on Real Prop., sec. 273.
Underhill vs. Saratoga, R. R. Co., 20 Barb., 455; 5 Pick., 528.

The grant of June 3, 1856, and others of similar tenor, have been repeatedly construed, as grants *in presenti*,

thereby the conditions have been by the federal courts, many times recognized as conditions subsequent.

Schulenburg vs. Harriman, 21 Wall., 60.

Grinnell vs. R. R. Co., 103 U. S., 739.

Wright vs. Roseburry (121 U. S.), 488 (as to swamp lands).

Mo., etc., Ry. Co. vs. Kan. Pac., etc., Ry. Co., 97 U. S., 496 (grant of 1862).

Van Wyck vs. Knevals, 160 U. S., 364 (grant of 1866).

In the Courtright case, 21 Wallace 316, Mr. Justice FIELD construing the act of the Michigan legislature, granting the lands on the express condition that the road should be completed within a given time, held the grant to the company to be on condition subsequent.

In the grant referred to in *Davis vs. Gray*, 16 Wall., 203, there were conditions to the effect that unless the company graded given portions of the road by given times, the charter should be null and void, but the conditions were held conditions subsequent and could not be insisted upon, as the state had made their performance impossible.

We do not understand the process of reasoning by which counsel concede that these grants from congress to the state are grants *in presenti*, but the grants from the state of the same character, containing the clearest words importing a present grant are to be construed as conveying no immediate estate.

For more than a generation the state legislatures have been conferring lands of this characture to corporations for the purpose of accomplishing the intention of the congressional grants. During that whole time the corporations so designated have been in the habit

of pledging lands so granted as an inducement to capitalists to furnish money.

State legislatures, congress and the courts have during that entire period recognized the validity of mortgages so made as conveying valuable equitable rights. The legislature of the state of Wisconsin has recognized in the most emphatic manner possible, the right of corporations to which these grants have been made to pledge the same for the purpose of constructing their roads. By acts passed in chapter 160, 1872, and 303, 1874, and 158, 1876 (See R. S. Wis., sec. 1858 and 1859), it was enacted that any railroad corporation upon which any lands granted to this state shall have been conferred, to aid the construction of any railroad may sell, assign and transfer the lands so conferred upon it to other corporations, on conditions therein specified. By the same acts any such corporation, has the right to raise money upon such lands by mortgage or deed of trust and to pledge the entire avails of such lands.

The act of congress approved May 5, 1864, referred to in the bill recognizes the right of the state to convey a vested and present right to the company in this language, in sec. 7, "That whenever *the company to which this grant is made or to which the same may be transferred* shall have completed," etc.

The supreme court of the United States has repeatedly recognized the right of companies holding these grants to mortgage the same.

In *Tucker vs. Ferguson*, 22 Wall., 572, Mr. Justice SWAYNE used this language:

"The validity of the mortgages is not drawn in question, and is too clear to be doubted. We need not, therefore, consider that subject. When the mortgages were executed the complainants took the legal

title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the lands. Copies of the mortgages are not attached to the bill, and we are not advised particularly of their contents. If they contain a covenant of warranty, the legal title, as fast as it was acquired by the company, inured to the mortgagees."

In *Davis vs. Gray*, 16 Wall., 204, although the grant was not a congressional grant, the company had accepted the grant from the state on condition that it would build the road within a given time, which condition had not been complied with, and had given a mortgage both upon the earned and unearned lands.

The validity of the mortgage as an entirety was made the basis of relief against the wrongful acts of the officers of the state, in their attempts to confer the lands upon another beneficiary.

In view of the legislative and judicial history of these grants and their known object, it seems a remarkable claim to be made by the state of Wisconsin, or any grantee of the state, that the Portage Company gained no present or vested interest in the lands in question.

(d.) It must be at least admitted that the grant from the state conferred the right to earn these lands; a valuable right.

But even if it should be admitted that the grants from congress and the state of Wisconsin conveyed no right to the railroad company, to make a valid pledge of the unearned lands by mortgage or otherwise, still this must at least be conceded that the several acts of the legislature of Wisconsin, conferred upon the Portage Company, *the right to earn these lands.*

It will hardly be denied that this right, by whatever legal name it may be called, was a valuable right.

To obtain similar rights railroad companies have been willing to incur great expenses; to preserve them they have been willing to invest large sums of money in surveys, in grading, and in constructing railroads through the wilderness. For the purpose of this demurrer it must be admitted that this right of the Portage Company was in the winter of 1881 and 1882 a right of great pecuniary value.

The Omaha Company, as appears from the bill, invested about $200,000 at one time for the purpose of securing the grant.

The transaction in Chicago when the wrecking scheme was consummated, could have had no other possible object than to deprive the Portage Company of its property and rights in this grant, and yet the claim is now made that the right to earn this grant conveyed and confirmed by successive legislatures was of no value, a mere abstraction.

Such a claim is akin to that which was made in *Gillet vs. Bates*, 86 N. Y., 87, where a creditor sought to set aside the transfer of a patent, and it was claimed by the fraudulent grantee, that the patent was void for want of utility, and that therefore creditors could not be damaged.

The court gave little consideration to such a pretense. We quote from the opinion:

"But it is insisted that a patent invalid for want of "utility or novelty, is not property, but is a void thing "and that creditors are not injured by its transfer by "the patentee, and cannot therefore set aside a trans- "fer by him, although made with intent to defraud "them. This seems a singular answer to be made by a

"debtor who has assigned his patent with intent to de-
"fraud his creditors, and who by his assignment has
"assumed it to be property, or by his fraudulent as-
"signee; and especially in a case where a debtor con-
"currently with such assignment sold an undivided in-
"terest for a large sum."

(c.) The right to earn this grant was secured to the Portage Company, by a contract with the state.

Said Mr. Justice SWAYNE, in *Davis vs. Gray*, 16 Wall., 216, referring to a grant by the state of Texas, to a railroad company: "That the act of incorporation and the land grant here in question, were contracts, is too well settled in this court to require discussion. *Fletcher vs. Peck*, 6 Cranch, 137; *New Jersey vs. Wilson*, 7 id., 166; *Dartmouth College vs. Woodward*, 4 Wheaton, 518; *State Bank vs. Knoop*, 16 Howard, 369.

"As such, they were within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities and may be laid out of view. *Von Hoffman vs. Woodward*, 4 Wheaton, 518; *State Bank vs. Knoop*, 16 Howard, 369. When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she or they can assert any right or immunity as incident to her political sovereignty."

This contract between the Portage Company, was

one on the faith of which the company had expended in various ways, large sums of money.

It was a contract on the sacredness of which they had every reason in equity and in law, to rely.

While the Portage company was the beneficiary under this contract, the value of which in 1881 could only be estimated by millions of dollars, shall it be said that its creditors have no standing in a court of equity to make complaint of the infamous scheme of bribery which the Omaha company for a fraction of the value absorbed the only fund available to them?

(f.) Even by creditor's bill courts may pursue intangible property.

Courts of equity have shown a laudable desire to thwart those schemes of rascality by which fraudulent grantees seek to enrich themselves in fraud of creditors.

As far back as 1822, in the case of *Hadden vs. Spader*, 20 Johnson, 554, it was declared that the courts of equity seemed unwilling to set bounds to their jurisdiction and say how far they will go; because fraud and trust are peculiarly of chancery jurisdiction, and consequently its powers ought to be so exercised that no subtilty or cunning shall be able to prevent the detection of fraud, or cause the failure of justice; and that it is the duty of the equity courts to decide new cases as they arise by the principles on which former cases have been decided, and thus illustrate, or enlarge, the operation of these principles.

Though it was formerly held that transfers of property could not be set aside by creditors unless the property was of such nature as to be subject to levy on execution, it was held in the case last cited that the property

of the debtor, in choses in action, in money and in stocks could be followed, and the person who wrongfully gained title could be held as trustee. In *Edmesten vs. Lyde*,, 1 Paige, 636, Chancelor WALWORTH declared, that since the principle had been established that every species of property belonging to the debtor, could be reached and applied to satisfaction of his debts, the powers of the court of equity were perfectly adequate to carry the principle into full effect. The cases cited in the notes to *Massey vs. Gorton*, 90 American Dec., 294, show that the courts of equity have gradually extended the remedy known as the creditor's bill to thwart the operations of fraud and to secure the ends of justice according to the exigencies of the case; that the courts have held that moneys may be reached, though not due, stocks, annuities, life insurance policies, trade marks, book royalties, patent rights, licenses under a patent right, legacies, etc.

The doctrine is thus laid down in Wait on Creditor's Bills.

"It has been observed that the principles towards which the highest courts in England and in all the states are more or less rapidly working is that the entire property of which the debtor is the real or beneficial owner, constitutes a fund which is primarily applicable to the fullest extent of its entire value, to the payment of its owner's debts. And the courts will not allow any of that value to be withdrawn from such primary application, if they can find any legal or equitable ground on which to prevent such withdrawal."

III.

Under the allegations of the bill the defendant has become a trustee, ex-maleficio.

The plaintiff is not restricted to the relief given by the creditor's bill strictly so called.

If the acts alleged in the bill show that the Portage Company had the vested right to earn these lands, that the debt represented by this judgment was incurred on the faith that the company would perfect its title to such lands; if those lands were so valuable that that reliance seemed a reasonable one, if the Omaha Company entered into a conspiracy to prevent the earning of the lands through fraud and corruption with the officers of the Portage Company, and have thus diverted from creditors the only property to which they could look for payment, then it is clear that on well known principles of equity the Omaha Company should be declared trustee *ex-maleficio* and held accountable to creditors.

It is clearly a case coming within the scope of that large class of constructive trusts, which arise from frauds committed by one party upon another.

"If a person obtains legal title to property by such arts or acts or circumstances of circumvention, imposition or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity in order to administer complete justice between the parties, will raise a trust by construction out of such circumstance or relations; and

this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party, and promote the safety and interests of society."

Perry on Trusts, vol. 1, p. 192, and cases.

The defendant cannot escape liability upon the plea that the Portage Company had not perfected its title to this grant, especially as it appears from the bill that the defendant has actively prevented that result.

"Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do, by converting the party who has committed the fraud, and profited by it into a trustee for the party in whose favor the act would otherwise have been done. Thus, if a person by his promise, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded, to the extent of the interest intended for him."

1 Perry on Trusts, p. 213, 3d ed.

Nor can they escape upon the ground that the frauds described in the bill assumed a form never before conceived by corporate or human greed.

"The specific instances in which equity impresses a

constructive trust are numberless, as numberless as the modes by which the property may be obtained through bad faith and unconscientious acts."

Pomeroy Eq. Jur., section 1045; id., sections 1047, 1053.

Like all others who participate in the fruits of fraud and afterwards seek to avoid the just penalty, this defendant seeks to find refuge behind the pretended formalities of law. The act of the legislature forfeiting this grant they claim as their shield. Their case might have looked more hopeful, perhaps, if their pretended title to these lands could have been filtered through some judicial decision or decree of court.

But if they had even that muniment of title it would not shield them from the consequences of such conspiracy and fraud as are disclosed by the record in this case.

In the case of *Drury vs. Crose*, 7 Wall, 299, the defendants sought to gain title to a railroad and its franchises through treachery of some of the officers of the corporation, and fancied that they could avoid the honest debts of the company, by using the formalities of a decree in court and a public sale.

Mr. Justice DAVIS characterized their conduct in these words:

"There is nothing in this record to mitigate the con-
"duct of the defendants who purchased the Milwaukee
"& Superior Railroad. They knew the road was
"abandoned, the company insolvent, the complainants
"unpaid for property then in the possession of the in-
"corporation, and yet they combined with timid and
"unfaithful trustees to get not only this, but all the
"property of the corporation, and adopted a plan to
"carry out their project, which resulted in raising the

"decree to an extent that would necessarily prevent all "fair competition. The fruits of such an adventure "cannot be enjoyed by parties concerned in it."

The court held that the purchaser through fraud had become the trustee of the creditors. See, also, *James vs. Railroad Company*, 6 Wall., 752.

The defendant will claim that it can not be charged as trustee, because the legislature of Wisconsin has in effect declared a forfeiture of the grant.

But there are two perfect answers to these claims. One is that the state had entered into a contract with the Portage Company, by which the latter had gained vested rights, and that the state could not prematurely confer those rights upon another.

The court in the case of *Davis vs. Gray*, 16 Wall., 216, above cited, a case having much in analogy with this in its general features rejected this doctrine for which counsel now contend, that there is some sanctity in a legislative act which can over-ride the obligation of solemn contracts, and the court protected the rights of creditors in a grant which the state had attempted to resume.

This is not simply the doctrine of a single case, it is the equity rule established by a multitude of decisions beginning almost with the origin of chancery jurisdiction and illustrated by cases as numerous and as diversified as the varying frauds they have been required to deal with.

The broad rule which seems to have guided courts of equty in so dealing with frauds actual and constructive and which seems never to have been lost sight of, is clearly stated in

Hammock vs. McBride, 6 Georgia, 178, 180.

There a party was endeavoring through the use of a

judgment procured by fraud to retain property from the party in equity entitled to it. After stating the rule in the strongest terms, the court say, p. 180: "And this is "right. The law abhors fraud, and *all the avenues which "lead to its detection and defeat, should not only be thrown "open, but kept free from the interposition of bars and es- "toppels of every kind.* * * * A fraudulent vendee "(or grantee) has no equity to be protected in a court "of equity."

The rule as stated, 2 Pomeroy, §1053:

"In general, whatever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or *through undue influence*, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of any legal title to retain and enjoy the beneficial interest, equity impressing a constructive trust on the property thus acquired in favor of one who is truly and equitably entitled to the same, *although he may never perhaps have had any legal estate therein*; * * * The forms and varities of these trusts which are termed *ex-maleficio* or *ex-delicto* are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong doer."

The cases bearing upon this question are all one way; there is no dissent. The only burden on the suitor is to prove the fraud; when this is established a court of equity will devise and secure him redress, no matter what the shield, device or instrumentality the perpetrator of the fraud may have attempted to use to carry out the wrong. Relief will be given whether the wrong-

doer has used testaments, deeds, courts, legislatures, judgments or statutes. A wrong-doer will not be allowed to withhold the fruits of his frauds and no instrumentality he can invent or employ will shield him in a court of equity,

We have referred to cases where it has been attempted to use courts and judgments as instruments or shields to cover and protect the wrong, and the courts with perfect unanimity prevent this. The same is true of wills when a devisee has procured the testator to disinherit an heir by false and fraudulent representations or undue influence against the heir.

Davis vs. Calvert, 5 Gill & J., 269, 303.
Feane, ex parte, 5 Vesey, 633.

Redfield Am. cases on wills, 420 and 521. The one guilty of the fraud and profiting by it, will be held trustee for the injured party.

Brook vs. Chappel, 34 Wis., 405.
Cutter vs. Babcock, 81 Wis., 195, 206.

Defendant objects that complainant can have no relief here because the court will not permit the intent or good faith or purpose of the legislature to be inquired into.

The answer to this is that the thing here to be inquired into is not the good faith or intent of the legislature. That is assumed to be pure and above question.

But it is the fraud and vice of the defendant, who by fraud and falsehood has imposed on and deceived courts and legislatures and by such means wrongfully

procured through decrees or statutes property to the injury and wrong of complainant.

Standard authors treat these evil practices as frauds on courts, frauds on testators and frauds on parliament or legislatures, and the doctrine is uniform that such wrong-doers shall not be protected against the person defrauded.

Kerr. on Frauds, 326–7.
Cocks vs. Ingalls, 7 Wall., 559.
Trust vs. Child, 21 Wall., 441.

White M., Ry. vs. W. M. Ry., 50 N. H., 50, was this case. "In 1853, the White Mountain railroad mortgaged its franchise and property to trustees for the security of bondholders, the mortgage containing a power of sale. In 1857, the trustees applied to the supreme court of New Hampshire for an order to sell. The mortgagors withdrew their opposition to such an order upon an agreement made by a combination of bondholders (intending to purchase at the sale) that the full value of the property should be accounted for to the mortgagors on their debts irrespective of the price realized at the sale. In 1858, the trustees having obtained a decree for sale sold the property to this combination of bondholders for much less than the real value.

One of the trustees received a bribe from the purchasers, to induce him to act for their interest, and he did so act. The purchasers formed themselves into a new corporation and credited the mortgagors on their debt, only the price realized at the sale. The trustees made no return of their doings, to the court. In 1859 the legislature of New Hampshire passed an act confirming the sale. The mortgagors were ignorant of the bribery of one of the trustees, until 1866, and upon

learning this, and that purchasers who were in possession of the road and property would not pay or account for the said value of the property bought on the sale, brought a bill setting forth the facts, and demanding relief. The bill was demurred to. In that case, as in this, the conspirators had used both courts and legislature, to carry out and secure the fruits of their fraud. The act of the legislature in the 2d section, enacted that the new company's corporate property should consist of the said road property, right of way and franchises of the late White Mountain Railroad, described and conveyed in the said mortgage, and then proceeded to enact that the sale and deeds made by the trustees under the mortgage (being the sale and deeds in controversy) should be, and were, "ratified, confirmed and made valid."

The court assumes the legislature were ignorant of the fraudulent character of the sale.

The opinion then proceeds: "But whatever knowledge or intention they (the legislature) may have had *the statute cannot operate to prevent the plaintiff from invalidating the sale by proof of fraud.*"

In conclusion the court say: "Upon the allegations of the bill the plaintiffs are entitled to some relief. Whether the auction sale shall be annulled, and a resale ordered, or the purchasers be compelled to account for the property at a fair price, or whether relief should be granted in some other manner, need not be determined."

Demurrer was overruled.

See Story Eq. Jur., sec., 293 A., Thirteenth Ed
People vs. Dispensa'y, 7 Lansing, N. Y., 304.

The claim has been made in a former argument that under the constitution of Wisconsin all corporate franchises are subject to repeal at the will of the legislature, under article 11, section 1.

But there is nothing in that article which gives to the state of Wisconsin the power to violate the plain provision of the constitution of the United States, that no state shall pass any law impairing the obligation of contracts.

The courts may have opportunities enough to give due force to that provision in our state constitution as affecting the mere powers of corporations without following counsel for defendant in their contention that the legislature under this provision can take away the property it has conferred by solemn contract upon one corporation and give it to another.

Miller vs. The State, 15 Wall., 498.

Commonwealth vs. Essex Co., 13 Gray, 253.

If it should be claimed as it has heretofore that the grant failed because of the failure to construct the section of twenty miles from Genoa, as provided by the grant from the state of Wisconsin, the answers to the claim are obvious. There was no such condition in the congressional grant, and the state had no authority to impose it. Moreover the requirement to build from Genoa had no connection relative to the lands which by the 9th section of the act of March 11, 1874, were to be conveyed to the company. But the perfect answer to this claim is that the act of March 28, 1878, waived that condition if it ever related to these lands. This act extended the time to build the land grant division, and took no notice of any alleged breach as to the Genoa branch.

A condition once dispensed with in whole or in part is gone forever; being an entire thing it cannot be apportioned except by act of law.

2 Washburn Real Prop., p. 21, 5th ed.

There is another feature of the case to which we desire to call the attention of the court. The Omaha company seems to have long feared that the state of Wisconsin might lose this magnificent grant, and in its patriotism, and to avoid this calamity, has itself constructed a railroad between the points named in the grant.

The Omaha Company easily swallowed its rival the Portage Company, and became to all intents and purposes its owner.

In other words the condition has been fully performed, and by a corporation interested in its performance.

Neither the state of Wisconsin nor any other being, except the Omaha Company, now makes an objection that the condition was not performed.

That company which so delights in the strict letter of the law, cannot complain of the application of this principle. Any one who is interested in a condition may perform it; and when once performed it is gone forever."

2 Wash. Real Prop., p. 13 (5th ed.), and cases cited.

Is is a verity for the purposes of this demurrer that the Portage Company was both able and willing to earn this grant and actually and successfully engaged in doing it, if the state of Wisconsin and the Omaha Company had not intervened and prevented that result. Even if the Omaha Company were free from taint of

the fraud and conspiracy alleged in the bill, we insist that as against creditors it could not reap the benefit of this alleged forfeiture, for the reason that the state itself, the grantor, by its own acts contributed in some degree to render a performance of the conditions named in the grant impossible. No rule is better settled than this; that if the grant is made on a condition subsequent and its performance becomes impossible by the act of the grantor, the performance of the condition is dispensed with and the grant is divested of the condition.

The United States vs. Arredendo, 6 Peters, 733.
2 Washb. Real Prop.,sec. 18.
Whitney vs. Spencer, 4 Cowen, 39.
Merrill vs. Emery, 10 Pick, 507.
Jones vs. Brunlet, 2 Ill., 276.

It is too plain for argument that the passage of the act pretending to resume and forfeit this grant could have no other effect than to defeat the enterprise to which the chief inducement was the earning of this magnificent grant.

But there is still another and strong reason which forbids the Omaha Company from holding these lands free from the claims of creditors of the Portage Company.

We will be told by counsel that the act of the legislature was an act of sovereignty, and that the court cannot inquire into the motives of the legislature. But they will hardly assume to claim that there is any rule of law which shields from inquiry the conduct of their client.

For the purpose of this demurrer it stands admitted that the Omaha Company, deliberately sought out the trusted officers of the Portage Company the officers

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For the purpose of this demurrer it stands admitted that the Omaha Company, deliberately sought out the trusted officers of the Portage Company the officers

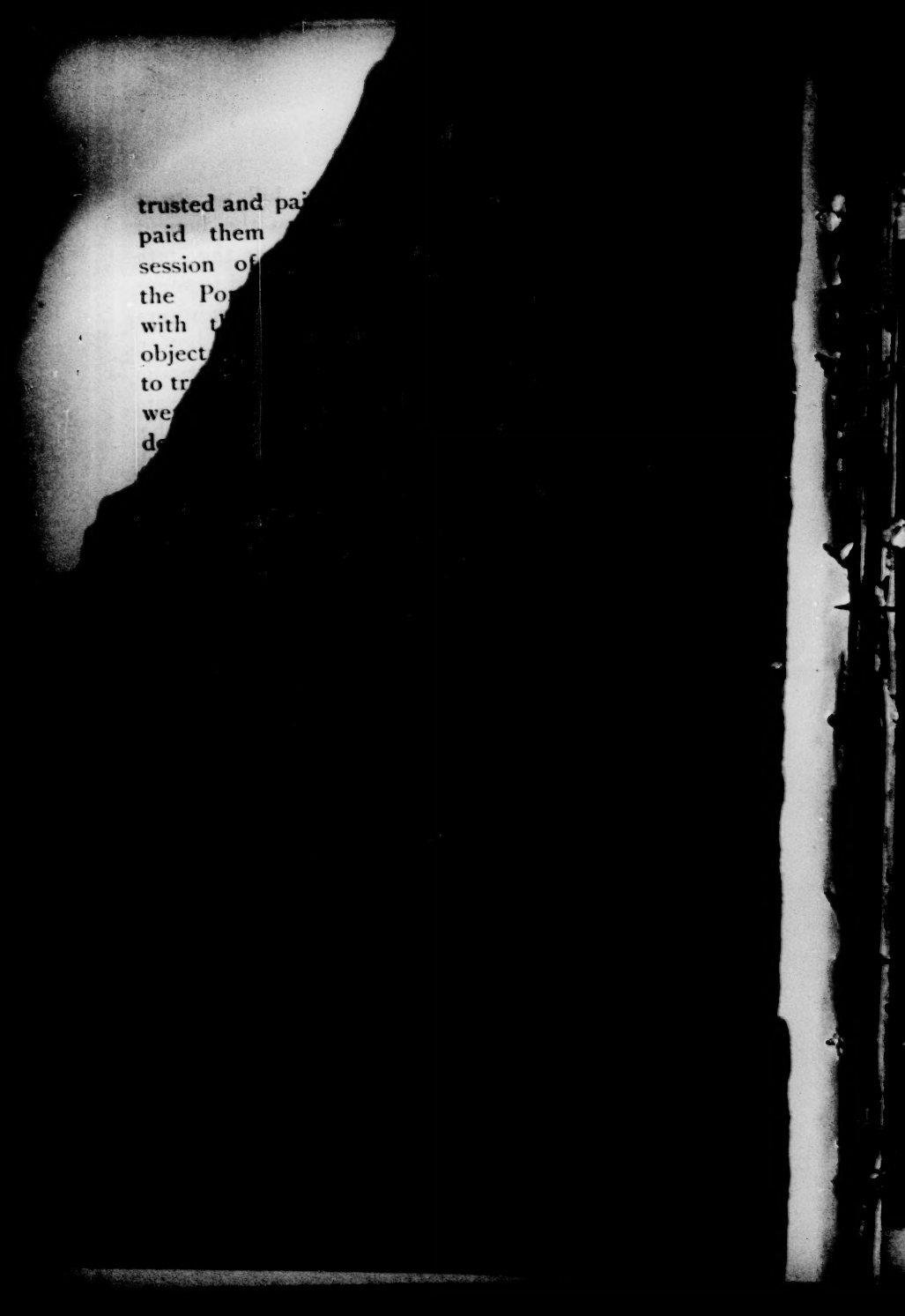
trusted and paid to protect this grant; that defendant paid them large sums of money to obtain possession of the stock held by them in trust for the Portage Company; that the defendant made with these officers an agreement in writing, the object of which was to secure their influence to transfer to a rival company the very grant that they were hired and had undertaken to protect; that the defendant made special efforts to disperse and did procure the dispersion of 1,600 men who were working to complete the road, and then the defendant in order to consummate the villainy, by judicial proceedings and injunction prevented those officers of the Portage Company who had not been bribed from taking any step to thwart the conspiracy; that by bribery and corruption they obtained control of the management of the Portage Company and hold it to this day for no other purpose than to hinder and delay creditors in the collection of honest debts.

Whatever might be the effect of an attempted forfeiture of this grant, in a contest between creditors of the Portage Company and a grantee from the state in good faith, this defendant cannot thus escape the consequences of its fraud.

It might well be doubted whether any stranger to this grant could be heard to object that the condition has not been performed.

But certainly that company which by conspiracy and bribery have prevented the performance of the condition cannot now thus take advantage of its own wrong.

LAMB & JONES,
Solicitors for Complainant.



Supreme Court of the United States.

SARAH R. ANGLE, Administratrix of the Estate of HORATIO G. ANGLE, deceased,
Appellant,

vs.

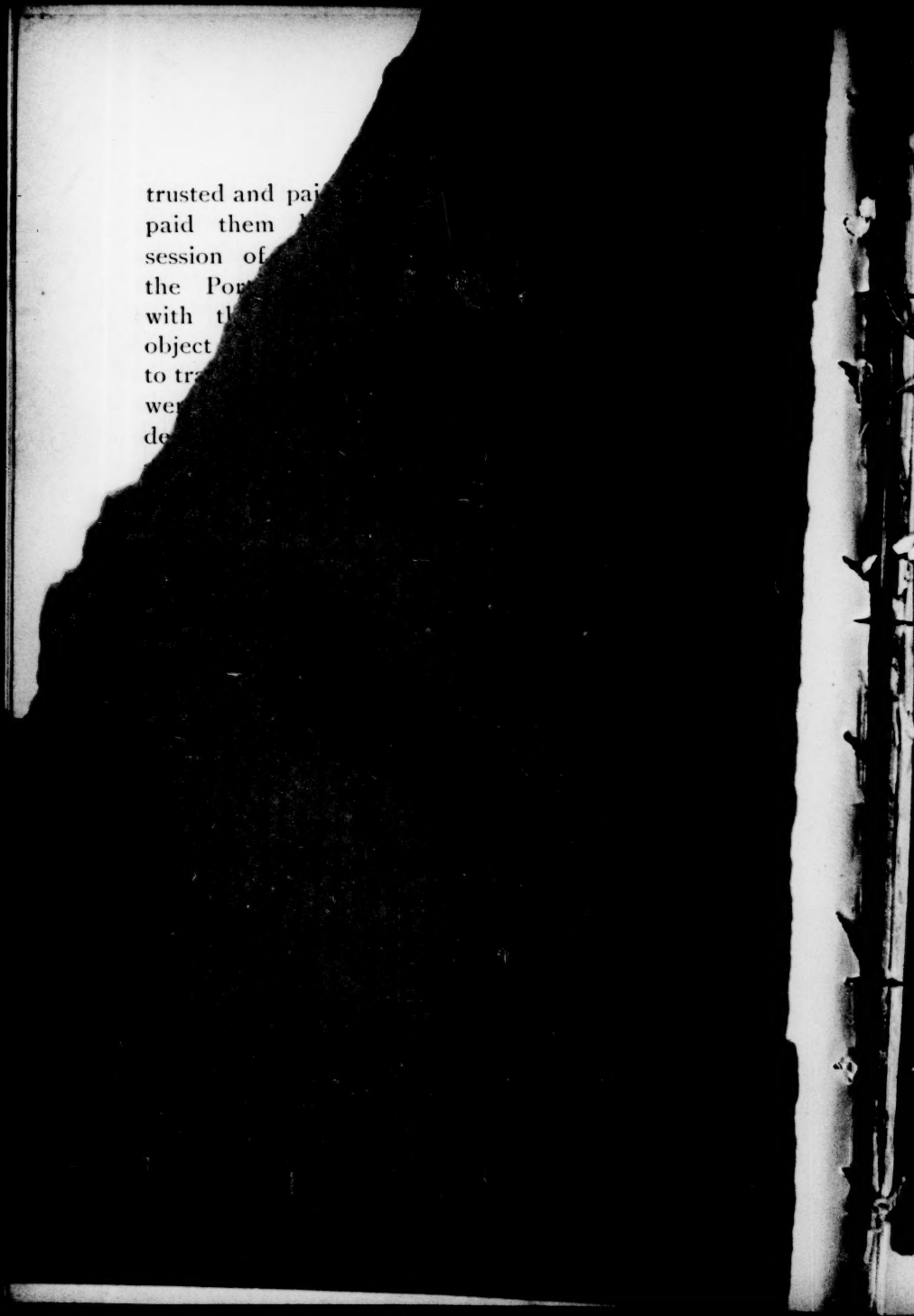
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, IMPLEADED WITH OTHERS,
Appellee.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF FOR APPELLANT.

Short Abstract of Facts Stated in the Bill.

On the 20th January, 1882, the Chicago, Portage and Superior Railway Company was building its land-grant division, sixty-five miles long, from Mud Lake, in Northern Wisconsin, to Superior City. It had a force of sixteen hundred laborers and seven engineer corps at work on the division—amply sufficient to complete it by May 5th, 1882, which was the day limited in the land grant. It had then recently contracted with



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the Grand Trunk Railway Company of Canada for immediate cash advances of $100,000 and for the sale of the bonds of the Portage Company, by which arrangement the Grand Trunk was to adopt the Portage Railway from Chicago as the extension of its own system to the Northwest. As soon as it became apparent that the Portage Company would succeed, if let alone, in earning the land grant, the defendant, the Omaha Company, commenced to locate and construct a branch of its own line from Mud Lake to Superior City, which branch was parallel and contiguous to the said land grant division of the Portage Company. The construction of a railroad on either of these adjacent lines, by authority of the State of Wisconsin, would satisfy the condition of the land grant prescribed by Congress.

The object of the Omaha Company was two-fold: first, to shut out the Grand Trunk Railroad system from Northern Wisconsin; and second to secure for itself the land which had been granted to the Portage Company, to aid the construction of that sixty-five miles of railway—comprising over 400,000 acres of pine timber worth about four millions of dollars, which was fully three times the cost of building that 65 miles of railway. To accomplish its purpose, the Omaha Company, on the 10th of January, 1882, contracted with the Chicago, Milwaukee and St. Paul Railway Company and with the Chippewa Valley and Superior Railway Company to unite with it in procuring legislation by the State of Wisconsin taking the land grant away from the Portage Company and giving it to the Omaha Company—the spoil to be shared between the companies. It was necessary to the plan of the conspirators to break down the Portage Company lest it complete the division within the time prescribed in its grant while the conspirators were preparing to rob it. For this purpose the Omaha Company bribed A. A. Jackson, who was a Director and the general counsel of the

Portage Company, and Charles J. Barnes, who was a Director and the Vice-President of that Company, and paid them the sum of $133,000 in cash, to betray their Company and prevent it building its land grant division by May 5th, 1882 (see these two contracts, *Exhibits K and L, Record pp. 50 to 57*).

With the help of these bribed officers of the Portage Company, the Omaha Company succeeded in stopping work on the land grant division, and in utterly destroying the credit of the Company; removing the supplies, implements and machinery of construction; dismissing and scattering all the surveyors and laborers; securing for itself possession of all the outstanding capital stock of the Portage Company; and getting the resignation of its Directors, and electing in their places enemies of the Portage Railroad in the interest of the Omaha Company —thus absolutely preventing the Portage Company from completing its land grant division. To make assurence doubly sure, the Omaha Company caused its bribed agent Charles J. Barnes as Vice-President and Director of the Portage Company, to apply for and obtain an injunction restraining all the officers and agents of that Company from doing anything whatsoever to complete its land grant division—which injunction thus fraudently obtained was obeyed.

At this time the Portage Company owed to its contractor Angle, the plaintiff's intestate, the sum of $205,883.19, balance for work done by him on the land grant division up to that date. For this amount Angle brought suit against the Portage Company in the Circuit Court of the United States, at Madison, Wisconsin, in February, 1882, and soon thereafter he died. His widow, as administratrix, subsequently obtained judgment in this action for the amount above named, on which execution was issued and returned *nulla bona*. She then brought this suit to subject to the payment of her judgment the land grant and its proceeds in the

hands of the Omaha Company, who held it, she claimed, in trust *ex maleficio*. The Farmers' Loan and Trust Company also brought suit against the Portage Company and against the Omaha Company to subject the land grant and its proceeds to the lien of $758,000 of outstanding first mortgage land grant bonds of the Portage Company issued under authority of the Revised Statutes of Wisconsin, 1878, section 1859.

The suit of the Farmers' Loan and Trust Company was argued on demurrer to the bill before Judge Gresham at Madison in 1888, when the demurrer was overruled. Both that case and this were argued next year before Judge Harlan, who sustained the demurrers, the bills in both cases being substantially the same.

The Omaha Company having secured all the stock of the Portage Company and all the outstanding bonds of that company, except 758 of $1,000 each, has no interest in the questions presented in this suit, or the suit of the Farmers' Loan and Trust Company against it above referred to, except to prevent the land grant, which was corruptly and fraudulently wrested by it from the Portage Company, from being charged with the lien of the said mortgage loan of $758,000 and the $205,883.19 judgment in favor of this complaint.

Both cases are in this Court on appeal from the decree of Mr. Justice Harlan in the Circuit Court dismissing the bill. The opinion below is as follows:

> "The plaintiff recovered in this Court, January
> "31, 1887, a judgment against the Chicago, Port-
> "age and Superior Railway Company (hereinafter
> "for convenience called the Portage Company)
> "for the sum of $205,883.19 damages and costs.
> "Execution having been issued and returned un-
> "satisfied, this suit was instituted for the purpose
> "of reaching and subjecting to the satisfaction of
> "that judgment the same lands as are in contro-

"versy in the suit in this Court, just determined, "of the Farmers' Loan and Trust Company, "Trustee *vs.* Chicago, St. Paul, Minneapolis and "Omaha Railway Company (hereinafter for con- "venience called the Omaha Company) and "others, and all notes, bonds or moneys arising "from sales, rents, stumpages, license charges, or "proceeds of sale of such lands in the hands "either of the corporation last above named or of "the judgment debtor. The allegations of the "present bill are substantially the same as the "bill filed in the other suit. For the reasons "stated in the opinion delivered in the suit "brought by the Farmers' Loan and Trust Com- "pany, the Court holds that the Chicago, Portage "and Superior Railway Company has no interest "in said lands which can be subjected in satis- "faction of the above judgment against it. The "demurrer is sustained and the bill must be dis- "missed with costs to the defendants. It is so "ordered."

(*See Fed. Rep.*, Vol. *39*, *p. 912*).

The opinion in the case of the Farmers' Loan and Trust Company referred to and adopted in the foregoing opinion of Judge Harlan in this case will be found in *39th Federal Reporter*, *p. 173*.

For the convenience of the Court the laws of Wisconsin and of the United States applicable to this case are printed in a separate pamphlet herewith.

The appellant asks a decree charging the lands originally granted by the Legislature of Wisconsin to the Portage Company, and afterwards granted to the Omaha Company, and their proceeds in the hands of the Omaha

Company, with the amount of her unsatisfied judgment against the Portage Company for $205,883.19, which judgment was rendered for work done by her deceased husband, H. G. Angle, on the land grant division of the Portage Railroad, relying solely on the credit of the land grant. Her prayer is based on three distinct grounds, on each of which we submit she is entitled to the relief so sought.

First Ground.—THE OMAHA COMPANY, BY FRAUD AND BRIBERY, PREVENTED THE PORTAGE COMPANY FROM COMPLETING THE LAND GRANT DIVISION OF ITS RAILWAY WITHIN THE TIME PRESCRIBED BY THE GRANT, AND ITSELF CONSTRUCTED A BRANCH OF ITS RIVAL RAILROAD ON A PARALLEL AND CONTIGUOUS LINE AND ACQUIRED THE LANDS FOR ITSELF; WHEREBY IT BECAME TRUSTEE OF SUCH LANDS *ex maleficio* FOR THE CONTRACTOR, ANGLE, WHOSE JUDGMENT FOR $205,883.19 AGAINST THE PORTAGE COMPANY WAS FOR A BALANCE DUE HIM FOR WORK DONE IN BUILDING THAT LAND GRANT DIVISION, WHICH WORK WAS DONE SOLELY ON THE CREDIT GIVEN TO THE PORTAGE COMPANY BY THE LAND GRANT.

Second Ground.—BY THE ACTS OF THE LEGISLATURE OF WISCONSIN OF MARCH 16, 1882, AND MARCH 7, 1883, THE STATE PREVENTED THE PORTAGE COMPANY FROM COMPLYING WITH THE CONDITION OF ITS LAND GRANT, AND THEREBY LOST THE RIGHT TO FORFEIT THE GRANT FOR FAILURE TO PERFORM THE CONDITION.

Third Ground.—THE ACT OF THE LEGISLATURE OF WISCONSIN OF FEBRUARY 16, 1882, REVOKING THE LAND GRANT TO THE PORTAGE COMPANY, AND CONFER-

RING IT ON THE OMAHA COMPANY, AND ALSO THE ACT OF MARCH 7, 1883, RE-ENACTING THE ACT OF FEBRUARY 16, 1882, ARE UNCONSTITUTIONAL AND VOID, BECAUSE IMPAIRING THE OBLIGATION OF THE CONTRACT BETWEEN THE STATE OF WISCONSIN AND THE PORTAGE COMPANY, AND ALSO THE OBLIGATION OF THE CONTRACT BETWEEN THE UNITED STATES AND THE PORTAGE COMPANY.

First Ground.

THE OMAHA COMPANY BY FRAUD AND BRIBERY PREVENTED THE PORTAGE COMPANY FROM COMPLETING THE LAND GRANT DIVISION OF ITS RAILWAY WITHIN THE TIME PRESCRIBED BY THE GRANT, AND ITSELF CONSTRUCTED A BRANCH OF ITS RIVAL RAILROAD ON A PARALLEL AND CONTIGUOUS LINE AND ACQUIRED THE LANDS FOR ITSELF, WHEREBY IT BECAME TRUSTEE OF SUCH LANDS *ex maleficio*, FOR THE CONTRACTOR ANGLE WHOSE JUDGMENT FOR $205,883.19 AGAINST THE PORTAGE COMPANY, WAS FOR A BALANCE DUE HIM FOR WORK DONE IN BUILDING THAT LAND GRANT DIVISION WHICH WORK WAS DONE SOLELY ON THE CREDIT GIVEN TO THE PORTAGE COMPANY BY THE LAND GRANT.

The Act of Congress of June 3d, 1856, and May 5th, 1864, granted lands to Wisconsin to aid in building a railroad "from the St. Croix River or Lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and to Bayfield." The portion of this grant from the St. Croix River or Lake to Bayfield was

granted by the Wisconsin Legislature to the North Wisconsin Railway Company—now the Omaha Company—and the sixty-five miles from that line to the west end of Lake Superior was granted to the Chicago and North Pacific Air Line Railway Company—now the Portage Company (*see accompanying pamphlet*, pp. ~~12~~, 3-6 ~~14~~).

The bill alleges and the demurrer admits in substance the following :

First.—That prior to January 20th, 1882, the Omaha Company had completed its land grant division from the St. Croix River to Bayfield, and had commenced to build a branch to connect with the Northern Pacific Railroad at Superior City. That such proposed branch coincided with the northern end of the Portage Company's line from Mud Lake to Superior City, a distance of about sixty-five miles, to aid in building which, the land in controversy had been granted by Congress to the State of Wisconsin, and by it to the Portage Company.

That when the Portage Company located, and commenced building its said land grant division, the Omaha Company located and commenced building its said branch which was at all points touching or but a few hundred yards distant from the Portage Company's line. That on the 10th of January, 1882, the Omaha Company made a written agreement with other railroad companies above referred to, by which the three agreed to unite in procuring legislation forfeiting the Portage Company's grant and transferring it to the Omaha Company, in consideration of a division of the spoils as set forth in said contract (*Bill Exhibit K, Record, p. 50*).

Second.—That on the 20th of January, 1882, the

Portage Company was rapidly constructing its said land grant division, and had half of the substructure completed, and sixteen hundred men at work upon it; had the iron and fastenings contracted for in Chicago for immediate delivery; had ample credit, and could and would have completed the division by the 5th of May, 1882 (the day fixed in the grant), but for the wrongful and fraudulent acts of the Omaha Company, and the other defendants, as therein set forth.

Third—The purpose and acts of the Omaha Company constituting the fraud, as fully set forth in the bill, may be briefly outlined thus:

The purpose was three-fold; to secure the lands (400,000 acres, see *Bill-Record, p. 18, fol. 28*), which were worth about four millions of dollars (*Record, p. 5, fol. 3*), (being about three times the cost of the sixty-five miles of land grant line); to get an outlet and connection for the Omaha Company at the terminus of the Northern Pacific at Superior; and to prevent the construction of the Portage road, which threatened to become a formidable rival, backed and adopted, as it was about to be, by the Canada Grand Trunk System.

To accomplish these ends, the Omaha Company, through defendant Cable, who acted solely as its agent (*Bill-Record, p. 12, fol. 20*), on the 20th of January, 1882, entered into a written contract (*Bill-Record, p. 52, fol. 83, Ex. L*) with defendants Barnes and Jackson, who were prominent and trusted officers and directors of the Portage Company—one its vice president, the other its general solicitor (*Bill-Record, p. 12, fol. 19*)—to betray and ruin their company and deprive it of its land grant by the following

wrongful and fraudulent acts—which acts were forthwith done and executed by them :

(*a.*) A sale and transfer to the Omaha Company of one million of dollars of the capital stock of the Portage Company, then held by them in trust for the Portage Company and others (in violation of their official duty and of the known rights and interests of the Portage Company) for the sum of $31,500 paid to said Jackson personally (*Bill-Record, p. 13, fol. 20*).

(*b.*) A sale and transfer to the Omaha Company of twenty-five thousand dollars of stock of the Portage Company, which belonged exclusively to it, and was in the hands of C. J. Barnes for cancellation (*Bill-Record, p. 13, fol. 20*), for the sum of $17,500 paid to said defendant Barnes, personally (*Bill-Record, p. 13, fol. 20*).

This one million and twenty-five thousand dollars of stock of the Portage Company was ~~a clear majority of~~ all of such stock then outstanding. Its sale and delivery to the Omaha Company, the known rival and enemy of the Portage Company, was necessarily disastrous to the last-named company, and to its written contracts and oral agreements with the managers of the Grand Trunk System of Canada, whereby said managers were to aid and promote the construction of the Portage Railway as an extension of the Grand Trunk System—the holding of the said million of dollars of stock in escrow, subject to issue only in *pro rata* instalments as each ten miles of the railway should be completed, or as each two hundred and fifty thousand dollars of the bonds should be sold, being a fundamental condition on which such aid and promotion were to be rendered (*Bill-Record, pp. 8, 9, fols. 13, 14*).

(*c.*) An agreement to obtain and deliver to the Omaha Company, if they could be purchased at not exceeding par, sixty-seven thousand dollars of promissory notes of the Portage Company held by A. S. Barnes, trustee, for moneys loaned the company, together with two million five hundred thousand dollars of the land grant bonds of the company, held by said Barnes as collateral to said loan.

The purpose of this purchase of stock and notes, and control of bonds, are explicitly declared in the contract (*Bill, Ex. L, Record, p. 65, fols. 87, 88*) to be, to enable the Omaha Company to secure "THE ACTUAL CONTROL AND POSSESSION OF SAID [Portage] RAILWAY COMPANY, ITS FRANCHISES AND PROPERTY." That declaration, standing alone, proves the fraudulent character of the contract. All the parties to it knew that the only object of the Omaha Company in getting control of the Portage Company was to wreck it, and thus prevent the construction of a rival road, and secure the land grant for itself.

(*d.*) The crowning infamy of this contract is in the implied condition that Barnes, the vice-president, and Jackson, the general solicitor, of the Portage Company should acquiesce in the passage, at the then current session of the Wisconsin Legislature, of an act forfeiting its land grant, and transferring it to the Omaha Company. On this legislation being had, Jackson and Barnes were to receive for their perfidy a further bribe of $84,250 (*Bill–Record, p. 56, fols. 88, 89*).

There is an apparent attempt in the contract to hide this "damned spot"; and one of the counsel for defendants even denied its existence. The contract is set out in full and shows for

itself (*Bill-Record, p. 83*). The Court will see that the $200,000 which was to be paid by Cable (the Omaha Company) to Barnes and Jackson, is made up as follows: $31,500 for the one million of dollars of escrowed stock, and $17,250 for the twenty-five thousand dollars of stock held in trust for the railroad company by Barnes for cancellation; making in all $48,750 paid Jackson and Barnes personally for stock of the Company, when neither of them had a right to sell a share of it (*Bill-Record Exs. D. E. F. Record, 30 to 43*). Add to this, $67,000 for valid notes of the Company held by A. S. Barnes, trustee, and we have a total of $115,750 entirely independent of the legislative forfeiture and transfer of the land grant—the payment of the remaining $84,250 to Jackson and Barnes being contingent on the passage of an act at that session of the Wisconsin Legislature revoking the land grant to the Portage Company of which they were trusted officers, and conferring it on the Omaha Company (*See contract Exhibit L., Record pp. 55, 56*).

The corruption and perfidy here manifested are the more repulsive from the fact that solicitor Jackson had been the active and paid representative of the Company at the next preceding session of the Legislature in defeating hostile legislation, and had just received a fee from the Portage Company for past services, and a retainer for services to be rendered in preventing such legislation, if attempted at the then present session; and that Barnes and Jackson were the officers to whom were especially entrusted the interests of the Company in Wisconsin—the President and nearly all of the other officers residing in the East; and that in their zeal to pocket the bribe of $84,250 they went beyond the letter of their infamous bargain—which merely bound them

to acquiesce in the spoliation of the land grant—and grossly lied about the condition, prospects and purposes of their Company to members of the Legislature, and otherwise exerted their influence as officers of the Portage Company, to procure the legislative forfeiture (*Bill–Record, page 12, fol. 19*).

The further acts of the Omaha Company and its bribed tools, Jackson and Barnes, in preventing the Portage Company from constructing the land grant division within the time limited, are set forth in the bill, in the language following, to wit:

> "On the day this agreement was verbally made "—the 19th of January, 1882—the said Joseph "Hickson, agent of said Chicago and Grand "Trunk Railway Company, limited, having com- "pleted at Chicago his said examination of the "Portage Company, had received from the Presi- "dent of said Company $100,000 of its bonds as "collateral to the advance of $50,000 provided "for in said loan contracts, and was about to pay "over said sum, when, at the instigation of "their co-conspirators, and for the purpose of "preventing said Chicago and Grand Trunk Rail- "way Company, limited, from aiding the Portage "Company, said Jackson and Barnes informed "said Hickson that they had sold and delivered "to said Cable the entire stock of the Portage "Company then issued, including the one mil- "lion dollars of stock which said Hickson sup- "posed to be held in escrow; said Cable being "well known to said Hickson as the representa- "tive of interests hostile to the Postage Com- "pany, and anxious to procure a forfeiture of its "land grant, and to prevent any extension to the "northwest of the Grand Trunk Railway sys- "tem.

"Thereupon the Chicago and Grand Trunk "Railway Company, limited, surrendered to the "President of said Portage Company the $100,- "000 of bonds deposited as collateral as afore- "said, and refused to advance the said sum of "$50,000, or the further sum of $50,000, or to "proceed further in carrying out said loan con- "tracts, for the reason that such sale and de- "livery of stock to Cable was in violation of the "essential condition of said contracts as herein- "before set forth.

"The President of the Portage Company, be- "ing cut off by said contract of January 20th, "1882, from said cash advances by said Chicago "Grand Trunk Railway Company, limited, "and from further payments on said A. S. "Barnes loan, surrendered his contract and coun- "termanded his order for rails and fastenings to "complete said sixty-five miles of railway.

"In further execution of said conspiracy, the "defendants (other than the Portage Company), "on the 19th or 20th of January, 1882, at Chi- "cago, Illinois, informed the General Manager "of the Portage Company of the terms, purpose "and effect of said contract of that date, and ad- "vised and induced him to telegraph officially "to A. C. Titus (who was chief engineer of the "company in charge of the work of constructing "said land grand division and who had seven en- "gineering corps then at work upon it), to forth- "with call in his staff, suspend work, pay off his "employees and sell the instruments and other "property of the company in his possession; and "also caused said General Manager to notify the "contractors on said division that the control of "the company had been changed, and the said "English capitalists forced out; and also to tel-

"graph to merchants in Duluth and Superior "City who were furnishing, on the credit of the "company, large amounts of supplies for the "1,600 men at work on said sixty-five miles of "line, saying that the company had been sold "out; and advising them to protect themselves, "because the company could not pay or protect "them.

"These orders and notices were sent by the "General Manager of the Portage Company on "the 20th of January, 1882, and the result was "that on their receipt, about the 24th of Janu- "ary, all the engineer corps of the company "broke up and dispersed; all the provisions, "supplies, animals, tools, materials and other "personal property belonging to the company "and to the contractor on the line, were attached "at the suit of said merchant creditors; and "the 1,600 men employed on that division "stopped work, dispersed, and wandered to Su- "perior City and Duluth, where, in the depth of "winter, penniless and unemployed, they were "forced to appeal to public and private charity "for relief.

"In further pursuance of said conspiracy, the "defendants (other than the Portage Company) "endeavored to get immediate control of the or- "ganization of the Portage Company, so as to "prevent any resistance being made by it to a bill "which they had caused to be introduced in the "Wisconsin Legislature on the 21st of January, "1882, to forfeit the grant to that company and "confer it on the Omaha Company. To this "end, they entered into negotiations with "the President of the Portage Company, "and with the Investment Company, and offered "them large money inducements to turn over "to said conspirators the organization of the Port-

" age Company, including the chief officers and " a majority of the Board of Directors. Failing " in this, they caused a bill to be filed by said " Ransom R. Cable in the Circuit Court for Cook " County, Illinois, against the Portage Company, " falsely charging the President and Board of Di- " rectors with intent to cheat and defraud the said " Cable by incurring improvident obligations and " otherwise, thus impairing the value of the " $1,025,000 of stock purchased by said Cable as " above set forth ; and praying for a temporary " injunction, which was granted, without hearing " or notice, and issued on the 11th of February, " 1882, restraining the President and other " officers of the Portage Company from do- " ing any act or thing whatsoever in the " name or behalf of the Company during the con- " tinuance of such injunction. At the instigation " of said conspirators, this bill was sworn to by " said Barnes, Vice-President of the Portage " Company, and the injunction granted thereon " was served on the President and several di- " rectors of the said Company who had assembled " in Chicago to take measures for its protection. " By means of said injunction, thus wrongfully " and fraudulently obtained, said Company and " all its officers who remained faithful to their " trusts were completely disabled for the time " being from effective opposition to the scheme of " said conspirators.

" In further pursuance of said conspiracy, said " defendants, other than the Portage Company, " caused the fact of the abandonment of work on " said sixty-five miles of railway and the disper- " sion of the forces engaged thereon to be " promptly and widely published throughout " Wisconsin, and especially among the members

" of the Legislature at Madison, then in session—
" taking care to conceal, however, the means by
" which the collapse of the Portage Company had
" been effected. Furthermore, they, and at their
" instance others employed by them, and espec-
" ially the said A. A. Jackson and C. J. Barnes,
" and who were well known as officers of the
" Portage Company and understood to be author-
" ized to speak in its behalf, falsely represented
" to members of said Legislature that the Port-
" age Company had made no substantial progress
" towards the construction of said land grant di-
" vision, and had never had any considerable
" number of men at work thereon, and was wholly
" without means or credit to prosecute such work ;
" that it had at last voluntarily and finally aban-
" doned all attempt to construct the same, and
" that it was willing to have the grant to it for-
" feited and given to the Omaha Company.
" Whereupon, the Legislature of Wisconsin, re-
" lying on these false representations, and with-
" out inquiry or hearing, hurriedly passed the
" Act of February 16th, 1882, above named,
" named, to forfeit the said land grant of the
" Portage Company and confer it on the Omaha
" Company."

" Until the issuing of the injunction against the
" President and Directors of the Portage Com-
" pany, and the passage of said Act of February
" 16th, 1882, a majority of the Directors of the
" Portage Company, and the said Investment
" Company, sustained the President of the Port-
" age Company in a struggle to save the Company
" and its property from destruction at the hands
" of said conspirators ; but, on being advised of
" the issuing of said injunction and the passage
"of said act of forfeiture, the said Investment

"Company (which had nominated and still con-
"trolled several of the Directors of the Portage
"Company) made terms with said Cable, and, in
"consideration of a cash bonus, assigned to him
"its rights under said reorganization con-
"contracts—placed in his hands the resignations
"of said Directors—and delivered to him a large
"amount of stock and securities belonging to the
"Portage Company held by it as collateral and
"otherwise. Thereupon all further resistance to
"the plans of said conspirators on the part of Di-
"rectors and other officers of the Portage Com-
"pany was abandoned as useless, and, on the 6th
"day of May, 1882, the Omaha Company, in fur-
"ther pursuance of said conspiracy, effected a re-
"organization of the Portage Company, whereby
"a large majority of the Board of Directors were
"chosen in the interest of the Omaha Company
"for the sole purpose of consummating the object
"of said conspiracy. Since this re-organization
"the Portage Company has been in a state of sus-
"pended animation, doing nothing to construct
"its railway, or to protect its creditors by remov-
"ing the cloud on its title to said lands, but kept
"alive by its rival, the Omaha Company, solely
"for use as a tool to defeat the purpose for which
"it was created, and to cheat its creditors by ac-
"quiescing in the spoliation of its land grant"
(*Record, pp. 14, 15, 16*).

All of these acts of the Omaha Company are recited and set forth in the bill solely as a foundation for the demand that the Omaha Company be treated as a trustee *ex maleficio* for appellant's intestate, H. G. Angle, who as contractor expended a very large sum, (for part of which the judgment of $205,000 was rendered,) in building this land grant division and earning the lands

granted, which lands were the sole basis of credit of the Portage Company and the sole security on which the contractor Angle could and did rely for reimbursement and recompense.

Counsel for defendants assume that all these allegations are made for the purpose of proving the Act of the Legislature of Wisconsin of February 16th, 1882, to be void, because its enactment was procured by false statements fraudulently made to members of the Legislature by the Omaha Company. Not so. The allegations as to these representations were inserted in the bill as showing part of the flagitious means whereby the Omaha Company prevented the Portage Company from earning the land grant. These allegations are the same in this bill as those in the bill in the case now on the docket of this Court, entitled "The Farmers' Loan & Trust Company against the Omaha Company and others"—which was argued on demurrer before Judge Gresham, at Madison, Wisconsin, in 1887, when the demurrer was overruled. At that argument, we orally, and in our printed brief, disclaimed any purpose to question the validity of the Act on the ground that its enactment was procured by false and fraudulent representations. Again in the argument before Mr. Justice Harlan in September, 1890, we disclaimed any such purpose, yet in the opinion rendered by him the learned Justice dwells at great length on the proposition that the Court could not declare a public act of the Legislature void because procured by fraud or misrepresentation. We suppose at this hearing the same proposition will be again presented by counsel for respondents and refuted. Never having taken such position or thought, of taking it, we are surprised at having it imputed to us over and over again—nothing being better settled than that an act of *public* legislation, otherwise valid, will not be declared void on the ground that members of

the Legislature were corrupted, or deceived, or misled in enacting it.

The egregious falsehoods and frauds charged against the Omaha Company in the bill are inserted solely to invoke in behalf of complainant that just and benign principle of equity which requires that where one defrauds another of his property the damage shall be made good by the wrong-doer. It matters not what the means are by which the spoliation is effected—whether through the executive department of the Government, as in fraudulently obtaining land patents; or through the Judicial department, as in obtaining a judgment or decree by falsehood; or through the Legislative dedepartment, in any way—a Court of equity will compel the spoliator to right the wrong out of the spoil itself. It will not sit in judgment on the motives of executive officers, or of Courts, or of legislators, through whose action the wrong-doer has triumphed, but it will deal with the wrong-doer himself and his spoil.

It is admitted by the demurrer that Angle was building the land grant division of the Portage Railroad, relying on the credit given to that company by the land grant to supply means to build that division by May 5th, 1892, and thereby earn the land and secure the payment of the amounts due him under his construction contract. The lands as alleged and admitted were of a value of about four million of dollars—several times the cost of constructing that sixty-five miles of railroad. The right to earn this, constituted all the property of the Portage Company and was the sole dependence of the contractor for payment. To prevent the company from complying with the grant, was to destroy all its means of paying the contractor. The fact that the Omaha Company stopped the construction of the railroad by dispersing the engineers

and laborers, and cutting off all supplies and credit, constitute, we submit, good grounds for the equitable relief asked for. If we should strike from the bill the allegations of false representations to members of the Wisconsin Legislature, the remaining allegations of acts of fraud and bribery, whereby the Portage Company was despoiled of its munificent land grant and its creditor Angle was robbed of his pay for work done, are ample to stamp the transaction as one of constructive trust and to require a decree for the relief here asked for.

Pomeroy Eq. Juris., Sec. 155, 171, 1053, 1057, 1413, 1415. *Note* 5.
Perry on Trusts, Vol. 1, Sec. 166.
Spence's Eq. Juris., Vol. 1, pp. 511, 512.
Cary vs. *Brown*, 92 U. S., 171.
Monger vs. *Shirley*, 87 U. S., 652.

Knowledge of and participation by the Chicago, St. Paul, Minneapolis & Omaha Railway Company in the whole scheme to cheat and defraud the creditors of the Portage Company and rob it of the land grant, are fully alleged in the bill (*Record, p. 12, fol. 18; p. 13, fol. 20, &c.*). In fact, the Omaha Company is alleged to be the principal, and Cable, Jackson & Barnes only its agents.

Replies to these Allegations of Fraud.

Counsel in the arguments below attempted to break the force of these allegations of fraud:

(*a.*) They attacked the reorganization contracts (*Exhibits D, E and F*) as improvident, and the loan contracts (*Exhibits H, I and J*), as providing for an illegal issue of stock.

It is of no consequence whether these

points be sustainable or not. There is no claim or demand here under either of said contracts, and their validity is, therefore, not in issue. The first two reorganization contracts provided that the one million of dollars of stock—which afterwards Barnes and Jackson fraudulently sold, and the Omaha Company fraudulently bought—should be held in escrow for issue only from time to time, as each ten miles of the road should be built, or each $250,000 of the bonds be sold (*see Exhibits D & E, Record, pp. 30 to 40*). This feature of said two reorganization contracts was left unchanged by the third (*Exhibit F, Record, p. 40*). Their only relevancy here arises from the fact, that this feature became an essential and fundamental condition of the contracts and understandings with the managers of the Grand Trunk Railway of Canada for promoting the construction of the Portage road, as an extension of its system (*Record, p. 10, fol. 16*); and that the Omaha Company corruptly induced Barnes and Jackson, who, as officers of the Portage Company, held for it this one million of escrowed stock, to sell the same in violation of their duty to the Company, and with the intent and obvious effect to break up the agreement with the Grand Trunk managers, and thus prevent the construction of the Portage Railroad, and the earning of the land grant.

(*b.*) It is claimed that Cable had a right to buy for the Omaha Company any stock which Barnes and Jackson might have, no matter what the effect on the Portage Company's negotiations.

That is true, if the transactions were fair. But the Omaha Company knew the fact that such sale by Barnes and Jackson was a

violation of their official duty to the Portage Company, and it bribed them to commit the outrage.

(*c.*) It is claimed that if Cable bought this stock for the Omaha Company, knowing that part of it was owned by the Portage Company, and the rest held in escrow for it, he got no better title than Barnes and Jackson had.

But the complaint rests on the obvious and necessary *effect* of the fraudulent purchase and sale on the *business* of the Portage Company. It was the bare fact of transfer of all its stock to its known enemy whose avowed object was to destroy it and seize its land grant, which made the transaction necessarily fatal to the Portage Company. Whether it was a legal transfer or not made no difference.

(*d.*) It is alleged that no change was made in the directory of the Portage Company until the 6th of May, 1882, being the day after the period for earning its land grant had elapsed, and therefore it remained free to complete its road and earn the lands up to that day.

The reason, doubtless, was that such change was unnecessary for the purposes of the Omaha Company. It had, before that day, killed the Portage Company—by securing control of all its stock—by the injunction—the legislative declaration of forfeiture of its land grant and its transfer to the Omaha Company—the dispersion of its working forces—and the destruction of its credit. The reorganization of the Portage Company on the 6th of May, in the interest of the Omaha Company, only embalmed it.

We venture to say, that the annals of American jurisprudence have never exposed to view a scheme of robbery, in a large way, more audacious, villainous and successful than this. It is unnecessary to cite additional authorities to maintain the proposition that the lands, so fraudulently obtained by the Omaha Company, and their proceeds, will be subjected in its hands by a Court of equity to the debts of the Portage Company contracted on the faith of the land grant.

Second Ground.

BY THE ACTS OF THE LEGISLATURE OF WISCONSIN, OF FEBRUARY 16, 1882, AND MARCH 5, 1883, THE STATE PREVENTED THE PORTAGE COMPANY FROM COMPLYING WITH THE CONDITION OF THE GRANT AND THEREBY LOST THE RIGHT TO FORFEIT THE GRANT FOR FAILURE TO PERFORM THE CONDITION.

A State is on a footing with any other grantor, and the Courts will not suffer it to forfeit for a failure to perform a condition subsequent, which failure it has *caused or contributed to.*

Davis vs. *Gray*, 16 Wall., 232.

"Where a condition subsequent be possible "when made and become impossible by act of "God, or the king's enemies, or the law, *or the* "*grantor*, the estate having once vested is not "thereby divested by the failure, but becomes "absolute."

Coke, Littleton, 206a, 206b, 4 Kent, 130.

The case of *Davis* vs. *Gray*, involved the grant by the State of Texas to the Memphis El Paso and Pacific Railroad Company for the construction of its railroad within the time therein prescribed, which construction was interrupted, and for the time being prevented, by the Rebellion of the State and the Civil War.

Justice Swayne, in citing this ancient rule, says:

> "The analogy of the rule applied here would "blot out those conditions [as to building the "railroad, etc.] but this would be harsh and "work injustice. Equity will therefore not apply "the principle to that extent. It will regard the "conditions as if no particular time for perform- "ance were specified. In such cases the rule is "that the performance must be within a reason- "able time (*Heyden & Stoughton*, 5 Pick, 528; "*4 Kent*, 125-6; *Com.'s Digest Condition*, "G. 5)."
>
> *Davis* vs. *Gray*, 16 Wall., 232.

In seeking in the case before us to follow the rule stated in *Davis* vs. *Gray* as to performance of the condition, where the grantor made the performance impracticable within the time prescribed, we have to say that the condition of the grant in this case was as follows: "The construction of a railroad within ten years, from a point on the St. Croix River or Lake, between townships 25 and 31, to the west end of Lake Superior; and from some point on the line of said railroad, to be selected by said State. to Bayfield (see *Act, May 5, 1864, pamphlet*). The line from the St. Croix River to Bayfield as selected by the State was built by the North Wisconsin Railway Company (the Omaha Company); and the grant from that line at Mud Lake to Superior was given to the Chicago and Northern Pacific Air Line Railway Company (the Portage Company) to be built by May 5th,

1882. The Portage Company located this northern end of its line, and had its construction so well advanced that its completion before May 5, 1882 (being the time prescribed in the grant), was assured, as stated in the bill, when the State of Wisconsin, by act of February 16, 1882, revoked the grant to that Company and gave it to the Omaha Company, requiring it to complete the line by December 1st, 1882. The Omaha Company did complete that 65 miles on its own right of way, alongside of the Portage Company's uncompleted line, and within the time prescribed. The ten years fixed in the Act of Congress of May 5, 1864, expired before the branch was built, but there having been no act or declaration of forfeiture by the United States, and the condition having been, performed the legal title to the lands vested in the State and became absolute. The condition having been once performed was ended. There was no public interest to be served by the Portage Company building a line alongside the Omaha Company's completed line through that sixty-five miles of heavily timbered, barren and sparsely settled country, and therefore there would be no "harshness or injustice" in applying the rule laid down by Littleton, Coke and Kent, as above given.

But the fact alleged in the bill that the Omaha Company, acquired when it stole the grant, and still owns all the stock of the Portage Company and controls the Company itself absolutely and without resistance or question, reduces the application of the above rule to the mere protection of the creditors of the Portage Company. It was only to cheat them that the Omaha Company, after having acquired all the stock of the Portage Company by bribing its vice-president, Barnes, and its general counsel, Jackson, broke down the Portage Company and got the grant transferred to itself. Certainly the judgment creditor of the Portage Company, who trusted it solely on the faith of its land

grant, may successfully invoke this just and ancient rule in this highest Court of America to protect him from becoming the uncompensated victim of this act of spoliation.

We do not understand the law to be that a grantor may interfere to prevent the performance of a condition subsequent and still claim the forfeiture, provided his interference falls short of making the performance *impossible*. If his willful interference is one of the causes of the failure to perform the condition, that is enough to prevent him from claiming the forfeiture. The grantee must do his best to perform, and the grantor must not thwart him. The State thwarted the performance of the condition by an act of its Legislature —which we believe to be unconstitutional, not because it interfered with the performance of the condition, but because it impaired the obligation of contracts. But whether constitutional or not, the act *did stop the work* and prevent the performance of the condition. All the credit and resources of the company grew out of the land grant. The repealing act destroyed its credit, dispersed its engineers, laborers and supplies, stopped work, and prevented its resumption.

His Honor Justice Harlan says, that if the repealing act was unconstitutional, it cannot be alleged, "in any legal sense" to have prevented the performance of the condition. But it is to be borne in mind that it was not the effect of the act *in law*, but *in fact*, which determined its influence on the performance of the condition. Suppose a grantor annexes to a land grant the condition that the grantee shall do a given amount of work on the land by a day specified, and while he is performing the condition, the grantor intimidates him with a cocked pistol and drives him away, thus preventing the performance of the condition. Can the grantor nevertheless enforce the forfeiture on the plea that the pistol was not loaded?

Mr. Justice Harlan says, that if the Portage Company had had money on hand sufficient to complete the division independent of the credit giving it by the land grant, it could have built it after the passage of the act revoking the grant, and that the validity of that act cannot be held to depend on the state of the finances of the Portage Company when the act was passed. Why not? The question is, what was necessarily the effect of the repealing act on the performance of the condition by the Portage Company in the situation in which it then was. The fact is alleged in the bill that the Portage Company was relying on the land grant as a basis of credit and was able to perform the condition, and that the repealing act destroyed its credit and defeated the performance.

We insist, moreover, that if the Portage Company had had abundant cash resources it could not have performed the condition after the Legislature had repealed the grant to it, for the reason that it was only by force and effect of the grant that it had the right to enter or remain on any part of that division. From the passage of that act, assuming it to be valid, all the officers and agents, engineers and laborers of the Portage Company on that division immediately became trespassers—removable by the executive and judicial officers of the State, and punishable as trespassers. Surely the Portage Company was not required, in order to save its land grant, to defy the State law and the State authorities. No judicial officer of the State or of the United States—no reasonable man—would have advised it to take the law into its own hands and undertake to hold the line by physical force. No capitalist would have risked his money in such a struggle.

It is true that the Act of Congress of March 3d, 1875, gave railroad companies generally the right of way over the public domain, but that act was not applicable to

the Portage Company, which had entered on the lands by virtue of the land grant. The Honorable Carl Schurz when Secretary of the Interior. decided that the Act of March 3d, 1875, was not applicable to any railroad company, which entered upon the public domain under a land grant (see Secretary's decision in *North Wisconsin Railway case* November 17, 1879, Copp's Public Land Laws, Vol. 2 p. 823). So that the Act of the Wisconsin Legislature revoking the land grant compelled the Portage Company to immediately quit work on the land, unless it and its financial backers chose to defy the power and authority of the State which created it.

The case of *Fletcher* vs. *Peck* (6th Cranch, 87) so elaborately stated and relied on by his Honor, Judge Harlan, in his opinion sustaining the demurrer in this case we respectfully submit is not at all in point. There is no contention here that the Act of the Legislature of Wisconsin, forfeiting the grant to the Portage Company and conferring it on the Omaha Company, is invalid because procured by misconduct of members of the Legislature. We *do* contend that the act is invalid, but entirely on other grounds, to wit: because it impairs the obligation of certain contracts; and because the State of Wisconsin by passing it deprived the Portage Company of its ability to perform the condition, and therefore cannot enforce the forfeiture.

In *Fletcher* vs. *Peck*, a legislative enactment is attacked because it was procured by fraud and bribery, involving necessarily an inquiry into the conduct and motives of legislators—which inquiry the Supreme Court held to be inadmissible. In this case, however, the allegation as to false representations to members of the Legislature are made on the assumption argumentatively that the act is valid, and that by it the Omaha Company acquired title, and on that assumption we in-

voke the rule of equity which compels the despoiler to make good the wrong and injury out of the spoils themselves.

If we strike from the bill all the allegations of false representations to the Legislature, there remain allegations showing that the Omaha Company bribed officers of the Portage Company to make a wrongful sale and delivery to the Omaha Company of all the stock of the Portage Company then outstanding; and thereby defeated the arrangement it had made with the Grand Trunk Company of Canada to enable it to build the land grant division—that it procured the dispersion of all the engineers and laborers, a force amply adequate, if not broken up and dispersed, to complete the construction of the land grant division within the time prescribed in the grant—that it caused the sale of all the Portage Company's surveying instruments, tools and appliances of construction—the seizure of all its supplies—the destruction of its credit, and finally the injunction sued out by the bribed Vice-President of the Portage Company prohibiting all the officers of that company from doing any act whatsoever for any purpose —all these acts of the Omaha Company absolutely and effectually prevented the Portage Company from earning its land grant. The fact that the Omaha Company crowned its scheme of spoliation by procuring an act of the Legislature giving it the land grant does not condone its villainies or shorten the arm of a Court of equity.

Third Ground.

THE ACT OF THE LEGISLATURE OF WISCONSIN OF FEBRUARY 16, 1882, REVOKING THE LAND GRANT TO THE PORTAGE COMPANY AND CONFERRING IT ON THE OMAHA COMPANY, AND ALSO THE ACT OF MARCH 5, 1883, RE-ENACTING THE SAID ACT OF FEBRUARY 16, 1882 ARE UNCONSTITUTIONAL AND VOID BECAUSE IMPAIRING THE OBLIGATION OF THE CONTRACT BETWEEN THE STATE OF WISCONSIN AND THE PORTAGE COMPANY, AND ALSO OF THE CONTRACT BETWEEN THE UNITED STATES AND THE PORTAGE COMPANY.

I.—The act of the Legislature of Wisconsin, of *March* 11th, 1874 (pamphlet, p. 3), provides that:

> "There is hereby granted to the Chicago and "Northern Pacific Air Line Railway Com- "pany [now the Chicago, Portlage and "Superior Railway Company] all the right, "title and interest which the State of Wisconsin "now has, or may hereafter acquire, in or to "that portion of the lands granted to said State "by said two acts of Congress, June 3, 1856, "and May 5th, 1864 [see accompanying "pamphlet, pp. 12, 14], as is or can be made "applicable to the construction of that part of "the railway of said company lying between the "point of intersection of the branches of said "grants, as fixed by the surveys and maps on file "in the Land Office at Washington, and the west "end of Lake Superior."

The act prescribes three conditions:

1st. That the Company accept the grant within sixty days from the date of the act—which it did (*Bill-*

Record, fols. 7 and 8). 2d. That it give the State such security for its compliance with the terms of the act, and of the laws of Congress making the grant, as the Governor shall approve—which it did (*Bill-Record, fol. 8*). 3d. That it build the land grant division from near Mud Lake to Superior City—sixty-five miles—within five years from the date of the acceptance of the grant. Before the expiration of the five years, to wit: March 28, 1878, the Legislature extended the time for the completion of the land grant division three years—to May 5th, 1882 (see accompanying pamphlet, p. 7). In January, 1882, the Company had nearly sixteen hundred men at work on that division, had it more than half graded, and would have completed it within the time prescribed, but for the wrongful acts of the Omaha Company, and the act of the Legislature of Wisconsin, February 16th, 1882, assuming to revoke and resume the grant and confer it on the Omaha Company—which act destroyed the credit of the Portage Company based on the grant, and thus prevented it from completing the road.

The grant, its acceptance and the bond for the performance of the condition, constituted a contract between the Portage Company and the State of Wisconsin, whereby the State became bound to let the company earn the grant by completing the said sixty-five miles of railway by May 5th, 1882, without hindrance on its part. Hence the said act of February 16th, 1882, declaring a forfeiture of the grant to the Portage Company, and conferring it on the Omaha Company, violated said contract, and therefore was unconstitutional and void.

II.—These acts, also impaired the obligation of the contract between the United States and the Portage Company.

Section 7 of the Act of Congress of May 5th, 1864 (see accompanying pamphlet), provides that, "whenever the Companies to which this grant may be transferred by the State of Wisconsin, shall have completed twenty consecutive miles, &c., patents shall be issued by the United States, conveying the right and title to said lands to the said Company entitled thereto."

This Act of Congress, followed as it was by the transfer of the grant to the Portage Company by the State of Wisconsin, and the acceptance thereof by the Portage Company, as above set forth, constituted a contract between the United States and the Portage Company, whereby the faith of the United States was pledged to issue patents to it for the land grant on its compliance with the conditions of the grant. This contract the acts of the Legislature of Wisconsin above named, impaired. Wherefore, these acts are unconstitutional and void.

Davis vs. *Gray*, *supra.*
Fletcher vs. *Peck*, 6 Cranch, 137.
New Jersey vs. *Wilson*, 7 Cranch, 156.
Dartmouth College vs. *Woodworth*, 4 Wheat., 518.
State Bank of Ohio vs. *Knoop*, 16 How. (U. S.), 369.

The cases in support of this proposition are so numerous and familiar that we shall only ask the Court to re-examine that of *Davis* vs. *Gray* (16 Wall., 203), which is so far parallel with this that it determines not only the general proposition above stated, but also very many other questions arising here.

In the argument on the demurrers, counsel for defendants attacked this proposition on four grounds:

I.—That the grant by the Wisconsin Legislature to the

Portage Company was itself invalid, because the State had no power to make it. They say the power of the State to dispose of said lands is derived from and limited by the act of Congress of June 3, 1856, which provides (section 4) that the "lands hereby granted to said State shall be disposed of only in manner following, &c.

Defendants say that the State was impliedly prohibited by this provision, not only from disposing of the lands (except to the extent of one hundred and twenty sections) in advance of a completed line, but also from making *any additional contract* whatever respecting their disposition; and therefore there is not, and never was, a contract between the State and the Portage Company respecting these lands.

This argument rests on the erroneous assumption that the above recited provision of the Act of June 3d, 1856, was in force on the 11th of March, 1874, when the State transferred the grant to this company. It was not. It had been repealed by implication by the act of Congress of May 5th, 1864, Section 7, of which act provides that, "whenever *the companies* to which this grant is made, *or to which the same may be transferred*, shall have completed ten consecutive miles of any portion of said railroads * * * patents shall issue, conveying the right and title to said lands to *the said company entitled thereto*, on each side of the road, as far as the same is completed, and co-terminous with said completed section, not exceeding the amount aforesaid; and patents shall, in like manner, issue as each twenty miles of said road is completed."

This method of disposing of the lands is inconsistent with that prescribed in the fourth section of act of June 3d, 1856. It, by implication, repeals section four

of the act of June 3d, 1856, and distinctly authorizes the grant to a company, which the repealed section is erroneously alleged to have prohibited.

But, aside from the explicit authorization of the grant to the Portage Company, by the act of May 5th, 1864, there is another and equally conclusive answer to the allegation of want of power in the State to make the grant, to wit: that section 4, of the Act of June 3d, 1856, does not, either expressly or by implication, prohibit the State from pledging the unearned lands *subject to all the conditions of the grant.* Such a construction would be utterly inconsistent with the sole purpose of the act, which was "to aid in the construction of railroads in said State." Congress undoubtedly contemplated that the State would not itself build or operate such railroads, but would offer the lands or their proceeds as an inducement to capitalists to build and operate them. The grant, by the act of 1856, was but six sections (3,840) per mile, which, *if sold in advance of construction of the road*, could not be expected to yield a fifth of the money needed to build and equip it. What inducement, then, could the State offer to capitalists to build and equip the first section of twenty miles of railway? Obviously, it would have to promise them that if they would construct and equip the first twenty miles, they should have all the lands or proceeds applicable to the remainder of the line; otherwise they would have no sufficient inducement to build it; and the act would thus fail of its object.

An examination of the statutes of the several States to which land was given by Congress to aid in the construction of railways, subject to provisions respecting alienation precisely the same as those in section 4, of the act of June 3d, 1856, shows that in every instance the States receiving the grants promptly transferred

them to incorporated companies subject to the conditions imposed by Congress.

The fourth section of the act of June 3d, 1856, was incorporated by Congress *in hæc verba* in ten acts of Congress, passed in 1856 and 1857, granting lands to different States to aid in the construction of railways.*

Each grant so made was promptly followed by an act or acts of the State Legislature, respectively, transferring the *entire grant* for a given road to some railway company, subject to all the conditions prescribed in the act of Congress.†

And several of such States expressly authorized the companies to which such grants were transferred, to mortgage all their rights thereunder, "*in possession, or expectancy,*" to secure means to build such railways.‡

Thus, section 4, of the act of 1856, incorporated in ten nearly contemporaneous land grant acts of Congress, was construed by all the States to which grants were made in 1856-7, as permitting the transfer of the entire beneficial interest to railway companies, in advance of the construction of any part of such railroads, subject, of course, to all the conditions of the grants.

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* Wisconsin—U. S. Statutes at Large, Vol. 11, p. 20; Iowa—U. S. Statutes at Large, Vol. 11, p. 10; Minnesota—U. S. Statutes at Large, Vol. 11, p. 196; Michigan—U. S. Statutes at Large, Vol. 11, p. 22; Mississippi—U. S. Statutes at Large, Vol. 11, p. 31; Alabama—U. S. Statutes at Large, Vol. 11, pp. 16, 18, 32 and 197; Florida—U. S. Statutes at Large, Vol. 11, p. 16; Louisiana—U. S. Statutes at Large, Vol. 11, p. 19.

† Laws of Wisconsin, 1856, p. 217; Statutes of Iowa, Revision of 1860, p. 215, act July 14, 1856; Minnesota, act May 22, 1857; Laws of Michigan, 1857, p. 346; Miscl. Laws of Mississippi, 1857, Dec. Ses., p. 104, and Laws 1858, p. 118; Acts of Alabama, 1857-58, pp. 7, 8, 9 and 66; Laws of Florida, 1856, p. 9.

‡ Laws of Wisconsin, 1856, pp. 213 and 222; Statutes of Iowa, revision of 1860, p. 221; Minnesota, act May 22, 1857, sections 20 and 21.

This contemporaneous construction by the several States of the provision in question was repeatedly approved by acts of Congress recognizing the several companies to which such grants had been transferred as being conditionally entitled to all the benefits thereof.*

In the case of *Tucker* vs. *Ferguson* (89 U. S., 805), the validity and effect of such transfers by the States to railway companies, and of the mortgages executed by such companies on the unearned lands, were expressly decided. The Supreme Court say: "The validity of the mortgages is not drawn in question, because too clear to be doubted. We need not therefore consider that subject. When the mortgages were executed, the plaintiffs *took the legal title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the lands* * * *

The three decisions of the Supreme Court (the *Schulenberg Case*, 88 U. S., 551; the *Farnsworth Case*, 92 U. S., 49; and the *Tucker Case*, 89 U. S., 805), are constructions of identical provisions—section 4, of the act of June 3, 1856, and section 4 of the act of June 3, 1857; and are almost contemporaneous—the *Schulenberg case* having been decided at the October term, 1874, the *Tucker case* later in the same term, and the *Farnsworth case* at the October term, 1875. The Court itself regarded them as entirely consistent with each other, for it notices no conflict between them. They establish conclusively the correctness of the contemporaneous construction of the provision in question by the several States, in transferring all beneficial interests to railroad

* Alabama—U. S. Statutes at Large, Vol. 11, p. 197; Wisconsin—U. S. Statutes at Large, Vol. 12, p. 618, and Vol. 13, p. 67; Iowa—U. S. Statutes at Large, Vol. 13, pp. 95, 364 and 528; Minnesota—U. S. Statutes at Large, Vol. 12, p. 624; Michigan—U. S. Statutes at Large, Vol. 12, p. 620; Vol. 13, pp. 409 and 520, and Vol. 14, p. 78.

companies, subject to the conditions of the grants, and in authorizing the companies to mortgage their "equitable or inchoate title," in the unearned lands.

II.—Defendants contend that the condition that this company should build its land grant division by May 5th, 1882, was a condition precedent; that as it did not perform the condition, no right ever vested in the company; and that its failure to perform, no matter how caused, is therefore an inevitable bar.

The following sentence from the opinion of the Supreme Court in the Farnsworth case (92 U. S., 49), was cited by counsel, with great flourish, as fully sustaining this contention: "The act made the construction of portions of the road *a condition precedent to a conveyance* of any other parcel (except the first 120 sections), by the State." This does not touch the question at all. It matters not that the construction of the successive twenty miles divisions was a condition precedent to the conveyance of title: to wit, the *issue of patents*. The question is, not when the company could have the legal title, but when it acquired an equitable right to earn the lands by building the railway. It unquestionably acquired that right on accepting the grant and filing the bond; subject, of course, to defeasance on failure to perform the condition subsequent.

In *Tucker* vs. *Ferguson* (89 U. S., 805), above cited, a case in all respects parallel with this, the Court say that the company took by the grant an "equitable or inchoate title" to the unearned lands.

In *Van Wyck* vs. *Knevals* (106 U. S., 365), the Court had under consideration just such a grant as that held

by the Portgage Company under the 7th Section of the Act of May 5, 1864. Mr. Justice Field, in delivering the opinion of the Court, says: "The grant is one *in presenti* except as its operation is affected by that condition: that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated * * *The legal title under the grant goes to the State, but the equitable right vests in the Company.*"

It is argued that this grant is on condition precedent, because the interest of the Portage Company was at best only equitable—and that a condition subsequent never attaches to a merely equitable title.

In the grant adjudicated upon in *Davis* vs. *Gray* (83 U. S., 447), the company had only a right to acquire title to the land granted, at the rate of eight sections per mile, from time to time as the grading should be completed in successive divisions, and an equal amount from time to time as the entire construction should be completed in such divisions. The Supreme Court held this grant to be on condition subsequent, and say: "Except as to a small portion of the land in question, the legal title is yet in the State. Whatever may be the right of the company, it is wholly equitable in its character. With a few exceptions, which have no applicability in the case, the same rules apply in equity to equitable estates as apply at law to legal estates. They are alike descendible, devisable, alienable, and barrable" (83 U. S., 447).

See also *Jickling on the Analogy of Estates*, 17.

Croxall vs. *Shererd*, 5 Wall., 281.

Walton vs. *Walton*, 7 Johnson's Ch'y., 272.

Cholmondeley vs. *Lord Clinton*, 2 J. & W., 147,

Burgess vs. *Wheate*, 1 Eden, 223.

Phillips vs. *Brydges*, 3 Vesey, 126.

In *Schulenburg* vs. *Harriman* (*supra*), the condition of forfeiture on failure to complete the road is expressly held to be a condition *subsequent*.

See also *Finlay* vs. *King*, 3 Pet., 346.
Nicoll vs. *Railroad Co.*, 12 N. Y., 121.

In a case of *fraud* the doctrine of conditions *precedent* can not be urged as a defense. In *Cary* vs. *Brown*, (92 U. S., 171), the gist of the bill of complaint was that defendants wrongfully conspired to get possession and title to the property in question, and, as a defense defendants set up a condition *precedent* to defeat the right of recovery, and the Court say: "In the presence of these facts" (fraud) "the doctrine of conditions pre-"cedent can have no application. Sterner principles "intervene and become factors in determination of the "case."

III.—It was contended in the arguments on the demurrers that the State of Wisconsin had power to revoke its grant to this company because all corporate franchises may be altered or repealed at the pleasure of the Legislature, under Article XI, Sec. I. of the State constitution, which is as follows:

"Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the Legislature the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the Legislature at any time after their passage."

(*a.*) By this constitutional provision, the *powers* con-

ferred by the Legislature on corporations are held subject to amendment or repeal. They are delegated by the Sovereign, to incorporal persons, solely to promote the general welfare; and the Constitution authorizes the Legislature, where the public interest seems to require it, to amend or revoke them. But here is no question of revocation of corporate powers. Here is a *contract* between the State and the Portage Company, whereby the State granted certain specified lands in consideration, and on condition of the construction of a designated line of railway by a day named, accompanied by a power to mortgage the lands, subject to the condition, for money wherewith to build it; followed by an attempted revocation of the grant after an issue of such mortgage bonds, and when the road was being built conformably to the condition. We omit argument and authorities, and assume that the Court will hold that the provision of the Constitution of Wisconsin above quoted has no application to this case, and cannot be used as a shield for such an outrage.

(*b.*) This contention ignores the fact that the State dealt with these lands as trustee as well as sovereign. The seventh section of the Act of Congress of May 5th, 1864 (Statutes, Vol. 13, p. 66), authorized the "transfer" of the grants to the several companies, and directed that, on the completion of each division of twenty miles of railway as prescribed in the grants, patents should issue to the company completing such division for two hundred sections of the lands. On the transfer by the State, by Act of March 11th, 1874, to this company, the faith of the United States became pledged that the company should have the right to earn the lands, subject to the conditions prescribed in the grant. No matter what the reserved power of the State to revoke franchises emanating from itself, it had no power to revoke a grant from the United States for which it was a mere

trustee, after the grantor had contracted for its faithful performance.

IV.—It is contended that, if the act of February 16th, 1882, annulling the grant to the Portage Company before condition broken and transferring it to the Omaha Company, be invalid because in violation of a contract, yet that objection does not apply to the act of March 5th, 1883, which confirmed the former act, after the time limited for completion had expired.

The unconstitutionality of the act of February 16th, 1882, arises from the fact that the State was bound by its contract to abstain from obstructing the Portage Company in building its land grant division. The declaration of forfeiture by the State destroyed the credit of the company and prevented it from complying with the condition of the grant—thus violating the contract. The act remained on the Statute book a continuing obstruction and violation of the contract, and the act of March 5th, 1883, equally violated the contract, and was therefore itself unconstitutional and void.

And by reason of the act of February 16th, 1882, there was no default on the part of the Portage Company, at the time the act of March 5th, 1883, was passed, nor, indeed, could there be any such default so long as either of said acts remained in force, and until a reasonable time thereafter The case of *Davis* vs. *Gray*, *16 Wall.*, *203*, cited above, is conclusive on this point.

Reply to Respondent's General Objections.

Having established, as we think, the three propositions with which we set out, we will now consider the objections made by defendants on the hearing below, which do not relate to either of said propositions.

THE PORTAGE COMPANY DID NOT BUILD THE RAILROAD.

(I).—It was contended that we are not entitled to relief, because the Portage Company did not build the land grant division, the construction of which was a condition of the grant.

The bill shows that the Omaha Company, in January and February, 1882, became the owner of every share of the capital stock of the Portage Company and the holder of a large part of its bonded and floating debt, and in that year built the line of railway, designated in the act of Congress, from near Mud Lake to Superior City, constructing it on a line parallel to and a few hundred yards distant from the half graded line of the Portage Company. We think it established that the act declaring forfeited the grant to the Portage Company and conferring it on the Omaha Company, is in contemplation of law a nullity. It follows that the Omaha Company was not a party to the grant, though it performed the condition. But as the sole stockholder and principal creditor of the Portage Company, it had a greater interest than all other persons or corporations in having the condition performed. The law avoids forfeitures where practicable, and therefore declares that: "*Any one who is interested in a condition may perform it; and when once performed it is gone forever.*"

2 *Crabbe Real Prop.*, *815* (Law Lib. Ed., sec. 2163, p. 537).
2d *Wash. Real Prop.* (2d ed.), page 12.
Vermont vs. *Society*, *&c.*, 2 Paine C. C., 546.
Marks vs. *Marks*, 10 Mod., 419.

This rule answers several objections which have been urged at great length on the other side.

(*a.*) To the objection that the second act of forfeiture

(March 5th, 1883) was effectual to forfeit the grant to the Portage Company, it furnishes a sufficient answer in addition to those above given, to wit: That the line of railroad, the construction of which by May 5th, 1882, was a condition subsequent of the grant, had been completed before the second act of forfeiture was passed. The failure to perform the condition in the time prescribed in the grant did not *ipso facto* divest the estate. A declaration of forfeiture *during the default* was necessary to divest it. (*Ludlow* vs. *N. Y. & H. R. R. Co.*, 12 Barb., 440). Such declaration not having been made until after the condition had been performed was wholly inoperative.

Vermont vs. *Society*, &c., 2d Paine C. C., 562.

(*b.*) To the objection that the railway prescribed in the grant of March 11th, 1874, was built by another company than the grantee, and under another grant, the answer is that the other grant (acts February 16th, 1882, and March 5th, 1883) was a nullity, and the other company being interested in the valid grant, had a right to perform the condition and save it (see cases cited *supra*).

(*c.*) To the objection that the Portage Company did not resume construction of the line after May 5th, 1892, the answer is two-fold; first, that the unrepealed adverse legislation of the State, stood, and still stands, as a continuing menace and insuperable obstruction; and second, that its sole stockholder—the Omaha Company—performed the condition, "and when once performed it was gone forever."

(*d.*) To the objection that it is inequitable that the Portage Company should have the grant when the condition was performed in the name and at the expense of the Omaha Company, the answer is, that the Omaha

Company was building this branch, while the Portage Company held the land grant and before the alleged forfeiture, to get a connection with the Northern Pacific, at Superior City. And further, it owned all the stock of the Portage Company and held as collateral or otherwise, all but 758 of its land grant mortgage bonds then outstanding. Wherefore, its only possible motive for obtaining the legislation to wrest the grant from the Portage Company, was to cheat the other creditors of that company who had no security for their debts but the land grant. Even had the Omaha Company acted throughout in perfect good faith, it hardly shocks one's sense of justice to find that it only fell short of securing four millions of dollars worth of land for the bribe of $133,000 of money to the extent of being compelled to take the lands subject to *bona fide* debts of the Company incurred wholly on the credit of the grant and to an amount not one-fourth the value of the land it stole.

As to the Requirement to Build from Genoa northwardly.

(II.)—It is contended that the grant by the State to the Portage Company depended on *two* conditions; first, the construction of the land grant division by May 5th, 1882, and second, the completion of twenty miles from Genoa (on the southern boundary of Wisconsin), northwardly, each year, from the date of the grant (see act 1874 accompanying pamphlet), and that therefore, as no railroad was completed from Genoa northwardly, by the Portage Company, it was in default on the second condition when the act of February 16th, 1882, was passed; and that this default sustains the forfeiture.

To this we reply:

First.—The Legislature could not have intended to make the construction of that portion of the road from Genoa northwardly a condition of the grant, for the following reasons:

(1.) Because such interpretation would be in conflict with section 9 of the same act (see accompanying pamphlet), which requires the patents to issue from time to time as the land grant division shall be constructed.

(2.) Because such interpretation would be in conflict with the thirteenth section of the same act, by which, in case of failure to file the resolution and give the bond by the Chicago and Northern Pacific Air Line Railroad Company, the lands were to vest in the North Wisconsin Railroad Company, and on its default in some other company, "*on the terms and conditions of said act of Congress and of this act.*" The North Wisconsin Railway Company or such other company, having no line, or authority to build a line, from Genoa northwardly, this provision would be irrational and impracticable if the requirements to build from Genoa northwardly were a condition of the grant.

But this provision was essential to prevent the defeat of the whole act (so far as it relates to this land grant) through a failure of the C. & N. P. Air Line Railway Company to pass its resolution of acceptance and file its bond. The act must therefore be construed, if practicable, so as to make that provision effectual. This can only be done by treating the provision for construction from Genoa northwardly as not a condition of the grant.

(3.) Because such interpretation would be in conflict with the express purpose of the grant by Congress, which was to secure the building of the land grant division of the road, and which expressly prohibits the application of the grant to any other object. (Act of

June 3, 1856, section 2.) It cannot be supposed that the Legislature intended to apply the grant to secure the construction of the whole 400 miles from Genoa to Superior, instead of confining it to the sixty-five miles of the land grant division to which use the act of Congress emphatically restricted it.

(4.) Because such interpretation would be in conflict with the rights of the Railroad Company under Sec. 7 of the act of Congress, approved May 5th, 1864, whereby an equitable title, subject to a condition subsequent, was vested in the Portage Company, to become absolute on completion of the land grant division only.

(5.) Defendant's counsel said in the argument below, that—

"The act of March 16th, 1878, waived all breaches of "conditions in the act of 1874 that had then occurred, "and extended the time for performing these conditions "three years. It waived the existing breaches, but "kept the condition intact. * * * The effect of this "act, therefore, was that three additional years to the "original limit were allowed for constructing each "twenty mile section of its road northerly; so that the "first twenty miles, that was to have been completed "May 4th, 1875, would have to be completed May 4th, "1878, about two months after the passage of the "Act."

This contention refutes itself. If the Genoa provision is to be considered as a condition of the grant, then the act of 1878 must be construed as waiving it. Otherwise we are forced to the absurd result that while the Legislature was adding three years to the unexpired time for building the land grant division, it was by the same act forfeiting the land grant by imposing the impracticable condition that the company assemble a construction force and build twenty miles of railway from Genoa northwardly within thirty-eight days from the passage of that act.

(6.) It was hinted, but not argued, that the act of May 4th, 1878, may be construed to extend the entire provision respecting the building from Genoa northwardly for three years from the passage of the act. This construction is contrary to reason. The obvious purpose of the act was to add three years to the end of the five years limitation for constructing the land grant division. This limitation would not have expired until May 5th, 1879, and was thus extended to May 5th, 1882—over four years from the date of the act. If the requirement to build from Genoa northerly was a condition of the grant, and was not waived by the act of 1878, then the construction under consideration would shorten this extension by more than a year. It is therefore inadmissible, being in conflict with the controlling and apparently sole purpose of the act.

(7.) If the provision to build from Genoa northerly were a condition of the grant, it was waived by the act of March 16, 1878, extending the time to build the road after this alleged condition had been broken The language of the act shows that the Legislature treated the grant as depending only on one condition as to time—for it uses the singular number—"the *time* limited," &c. If, in fact, there had been two time limits, then, as this act clearly refers only to the time limited for completing the land grant division, the other (and at that time broken) condition can only be treated as intentionally waived.

Second.—But if the Legislature intended the Genoa provision to be a condition of the grant it is void as such, and must be disregarded, for the following reasons:

(1.) Because the State was a mere trustee, operating under limited powers, and such condition is in excess of its powers. "Where there is a complete execution and

"something *ex abundanti*, added, which is improper, "there the execution shall be good and only the excess "void."

Sugden on Powers (8th Ed.) p. 519.

Where a distinct limitation in excess (such as the Genoa condition) is superadded, it only is void (*Id.*, p. 250).

(2.) Because such a condition would be void as repugnant to the grant, which requires the delivery of the patents on completion of the land grant division.

St. at L. Vol. 13, p. 66 (accompanying pamphlet).
Willard on Real Estate & C., p. 103.
Comyn's Digest, Tit. Condition (D. 4), Vol. 3, p. 93.
Id. (D. 5), 94.

~~Second~~ Third.—Counsel for defendants insist that there is still a third condition of the grant which was broken, to wit.: That the Portage Company "shall construct, "complete and put in operation its land grant division "as soon as the North Wisconsin Road shall construct "and put in operation its line from the City of Hudson "to said point of intersection." (See Act 1874—pamplet.)

We think this provision clearly and only means that the company shall enter upon the construction as soon as the line to the point of intersection shall be built, and shall prosecute the work with due diligence until the land grant division be put in operation.

This construction is strengthened by the fact that this land grant division had no railway touching it over, which material could be carried until the railway from Hudson was completed to the point of intersection. No railway existed anywhere nearer than Duluth, which was about six miles from the northern terminus

at Superior, and separated from it by a large unbridged river. But it was admitted in the argument below that the railway from the City of Hudson to the point of intersection was not completed until 1880. If the Portage Company at that time should have had its railway built, by the terms of the original act, then the act of 1878, either impliedly waived that condition or extended it three years—to 1883—a year longer than the limitation in section one of the Act of 1878, which extended the time to May 5, 1882.

The Suit is more than a Creditor's Bill.

It has been suggested that as this suit is in the nature of a creditor's bill, if the Portage Company from any cause is estopped from asserting the trust, the administratrix of Angle is without remedy.

While denying this proposition, we reply that the Portage Company is not estopped.

It in no manner consented or acquiesced in the acts of the Omaha Company complained of, out of which the constructive trust arose. The bill alleges that Barnes and Jackson had no right to sell or deliver the stock, and only the *power* to do it by committing a breach of trust. The Omaha Company knowing that they held the stock in trust for the Portage Company and bribing them to commit the wrongful act, cannot avail itself of the plea that the Portage Company put it in the power of Barnes and Jackson to betray it.

Whoever claims the benefit of estoppel must not himself be a wrong doer in the act which estops.

But this is not merely a creditor's bill.

That Judge Harlan regarded this as only a creditor's

bill is apparent from the language of his decision. But the appellant claims that if, for any reason, the Portage Company is estopped from holding the Omaha Company as trustee *ex maleficeo*, there is no reason why this action cannot be maintained in behalf of the estate of Angle. Most, if not all, the acts complained of were torts again Angle as well as against the Portage Company. The fact that he sued the Portage Company on his contract, and that his administratrix having obtained judgment against it, then proceeded against the Omaha Company on the judgment, does not deprive her of the right to hold the Omaha Company in this case, on the facts alleged in the bill, as a constructive trustee for Angle.

For the convenience of the Court, the following is printed, which is believed to be a fair statement of the legal propositions discussed by the Court below, and upon which, exclusively, it based its decision.

Grounds of Judge Harlan's Decision.

I.

That although the right of the Postage Company to earn the land grant in question was probably not affected by its failure to build the road fromGenoa northerly, yet, assuming that the Act of February 16, 1882, was void as impairing the obligation of a contract between the State and the Portage Company, the following facts stand in the way of granting the relief sought:

(1.) No corporation could acquire the land grant except under the conditions imposed by the Legislature as to the time within which its railroad should be completed.

(2.) By the Act of March 4, 1874, and that of March 16, 1878, the time limited for the completion of the railroad by the Portage Company expired, at least, on May 5th, 1882.

(3.) That on that day the Portage Company had not performed that condition.

II.

The revocation of a land grant by an unconstitutional void Act of the Legislature did not make impossible, "in a legal sense," the performance of the condition upon which the company's title to the lands depended, and did not excuse its failure to perform that condition.

III.

That after the expiration of the time limited within within which to complete the work, to wit, May 5, 1882, the Act of March 5, 1883, was passed, the legal effect of which was a revocation and grant *de novo*.

IV.

That the Court cannot inquire into the motives of the Legislature in passing the Acts in question, but must assume that every fact affecting the justice of such legislation was in its possession, and that it acted for the general welfare.

V.

That the Omaha Company in building the road to the western end of Lake Superior did not act as a stockholder or creditor of the Portage Company, but proceeded under its own charter representing its own stockholders; that it did not elect, or intend, to perform a condition imposed on the Portage Company; and, therefore, there is no applicability of the ancient rule, that "anyone who is interested in a condition may perform it, and, when performed, it is gone forever."

The appellant respectfully claims that some of these legal propositions are unsound, and that it is clear from the line of argument adopted, as well as the length at which certain undisputed principles of law are discussed, that the chief points upon which she relies were to a great extent misapprehended by the Court below.

Briefly Re-stated our Contention is:

I.

That wholly irrespective of the validity of the acts forfeiting the Portage Company's land grant, the Omaha Company acquired the lands *ex maleficio* as trustee for the Portage Company and its creditors. (*See full description of this proposition, ante, pp. 7 to 24.*)

II.

The act of Wisconsin of February 16, 1882, revoking the grant is unconstitutional and void, because it impairs the obligation of the contracts between the State

and the Portage Company and between the United States and the Portage Company. (*See full discussion of this proposition, ante, pp. 31 to 42.*)

III.

That the failure of the Portage Company itself to build the land grant road was caused by the grantor, the State of Wisconsin, by revoking the land grant; wherefore, the State could not forfeit the grant for failure to perform the condition. (*See full discussion of this proposition, ante, pp. 24 to 30.*)

IV.

The Omaha Company performed the condition on or prior to December 1st, 1882, with the assent of the State, and, as the condition could not beneficially to the public be performed twice, the title to the lands became absolute in the State. The subsequent act of May 5, 1803, confirming the void act of February 16, 1882, was itself void for the same reason. (*See full discussion, ante, pp. 43 to 45.*)

V.

The legal title to the land was conveyed by the Governor of Wisconsin to the Omaha Company and is now held by it. The only question is, whether a Court of equity will subject it to the debt of $205,883.19, due Angle by the Portage Company; first, because the Omaha Company acquired the legal title by bribery and fraud as a trustee *ex maleficio* for the Portage Company and for Angle; second, because the Omaha Company did not acquire the *equitable* title for the reason that the State

had not the right as grantor to prevent its performance of the condition and then forfeit for failure to perform; and third, because the acts of Wisconsin transferring the grant were unconstitutional and void.

VI.

Mr. Justice Harlan says that the Omaha Company in building its road did not act as a stockholder or creditor of the Portage Company, but proceeded under its own charter representing its own stockholders; and that it did not elect or intend to perform a condition imposed on the Portage Company.

Whatever was the intention of the Omaha Company in building the road is immaterial. If the Act of February 16, 1882, was unconstitutional then the Omaha Company in building the road could not have "proceeded under its own charter, representing its own stockholders," because it had received no grant and could earn no land. In building this road the Omaha Company was either a tresspasser or an interested party, to wit: the sole stockholder of the Portage Company. The Court will not assume that it acted in the former capacity.

VII.

Our first and special ground of relief is that by the bribery and fraud whereby it acquired the land grant, the Omaha Company became trustee of the lands *ex maleficio* for the Portage Company and the contractor Angle.

This ground is not discussed at all in the opinion of Mr. Justice Harlan. He devotes the chief part of his

opinion to an elaborate argument and array of authorities, showing, that in a suit between individuals an act of a legislature relating to public objects cannot be declared void because of alleged misrepresentations to or ignorance or misconduct of legislators. This proposition we neither doubt nor deny. Our denial of the validity of the Act of February 16, 1881, is based on the fact, not that it was wrongfully procured to be enacted, but that it impaired the obligation of contracts. The allegations in the bill as to false representations to the Legislature were not made to attack the validity of the act referred to but to show one of the numerous acts of fraud and misconduct by the Omaha Company which make it liable as a trustee *ex maleficio*.

(*See ante, pp. 7 to 24.*)

Mr. Justice Harlan barely alludes to this our chief grouud for relief, in saying :

" What has been said disposes of the suggestion that " the dispersion of the force employed by the Portage " Company in the early part of the year 1881 (1882), in " the construction of its road—the suspension of the " work of construction, and its inability to raise the " necessary funds for the completion of the road within " the time stipulated was the result of machinations of " agents of the Omaha Company and of the corrupt " conspiring of those agents with officers of the Portage " Company whereby those officers neglected to do toward " the timely completion of the road what in fidelity to " their employers they might have done. Whether this " arraignment of the Omaha Company is justified by " the evidence or whether the Portage Company could, " in its weak financial condition in 1881, (1882) have " completed the road within the time required if its " plans had not been interfered with in the manner " stated, *it is not necessary to determine. For, as* " *already indicated, if all that is said in respect to the* " *conduct of the Omaha Company were clearly estab-*

"*lished, the settled principles of law forbid the Court*
"*from assuming that the legislative department of the*
"*State when it passed the act of 1882, as well as the*
"*confirmatory act of 1883, was not in possession of*
"*every fact affecting the justice of such legislation.*"

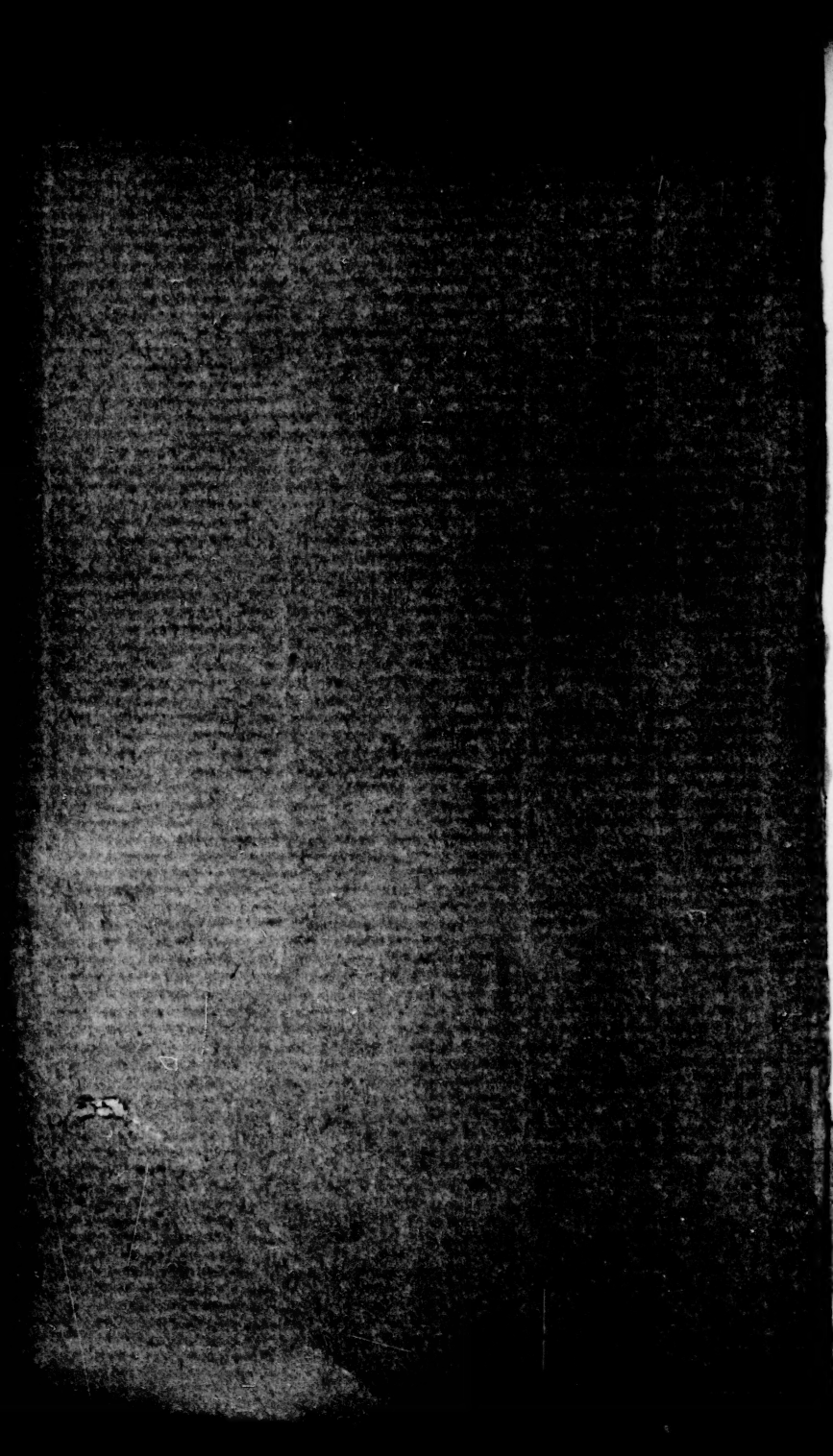
Thus his Honor, Judge Harlan, utterly ignores the precise and elaborate statements in the bill of the facts which make the Omaha Company a trustee *ex maleficio* for the Portage Company. His reason for doing so being merely that we cannot assume that the legislature of Wisconsin was ignorant of any fact affecting the justice of the acts of forfeiture—an assumption which, if made, could have no bearing whatever on the case. We claim that, by an overwhelming weight of authorities cited in the several briefs for appellant, a Court of equity should declare the Omaha Company a trustee *ex maleficio* of the granted lands because of the flagrant bribery and frauds perpetrated by the Omaha Company in securing the property—and this, wholly irrespective of the validity or invalidity of the acts forfeiting the land grant.

We ask the attention of the Court to the very able briefs filed for appellant by Hon. James R. Doolittle and by Messrs. Lamb and Jones of Madison, Wisconsin, and to the authorities cited therein.

In view of the egregious wickedness and villainy whereby the Omaha Company despoiled the Portage Company of its land grant and impoverished the contractor who was building the railroad on the faith of the grant, we confidently expect this Court to apply here the noble sentiment expressed by Mr. Jus-

tice Swayne in delivering the unanimous opinion in the case of *Monger* vs. *Shirley* (87 U. S., 652)—where title to land had been acquired under a decree of a Court of competent jurisdiction, fraudulently obtained. "It would be a reproach upon the "administration of justice if such a title, thus acquired, could avail to defeat the rights of the complainant and give triumph to the iniquity thus practiced upon him."

THOMAS EWING,
MILTON I. SOUTHARD,
Of Counsel for Appellant.



Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No. 73.

SARAH R. ANGLE, Administratrix of the Estate of Horatio G. Angle, deceased,
Appellant,

vs.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Appellee.

BRIEF OF APPELLEE.

Statement of Case.

The plaintiff recovered judgment in the United States Circuit Court for Wisconsin, January 31, 1887, against the Chicago, Portage and Superior Railway Company for the sum of $205,883.19, damages and costs. Execution having been issued and returned unsatisfied, this suit—a creditor's bill—was instituted for the purpose of reaching and subjecting to the satisfaction of that judgment certain lands which had been granted by the United States to the State of Wisconsin to aid

16th, 1878 (Laws 1878, p. 442), the time for the completion of said sixty-five miles of road was extended from the 5th day of May, 1879, to the 5th day of May, 1882 (Record, p. 5).

That the Portage Company, having broken down in the panic of 1873–4, laid dormant until 1880, when it took steps to raise the means necessary to build said sixty-five miles (Record, p. 8), and in August, 1881, entered into a contract with Horatio G. Angle (complainant's intestate) for the construction thereof by him, by the terms of which said Angle was to receive as his compensation therefor the sum of $8,500 per mile, cash, and $5,000 per mile of the full paid stock of the company "upon condition that the road should be completed on or before the time when the grant of said lands to said railway company by the Legislature of Wisconsin would expire" (Record, p. 6).

That in case said railroad company through its contract with Angle had fully completed said sixty-five miles on or before May 5th, 1882, it would have been solvent and able to pay all its debts, including its obligations to said Angle under said contract (Record, p. 6).

That said Angle under said contract entered upon the work of construction and made such progress therein that on the 20th day of January, 1882, "it had become and was an assured fact that said railway would be completed on or before the 5th day of May, 1882, so as to comply fully with the conditions of said grant" (Record, p. 6).

That "the Portage Company did everything in its power to assure completion of said sixty-five miles by the 5th day of May, 1882, and to prevent hostile legislation," and, "in the fall of 1881 and early in the

winter of 1882 it borrowed large sums of money and expended the same in pushing construction of said land-grant division, so that on the 19th of January, 1882, more than half the sub-structure was completed," and more than 1,600 men were at work upon it, " and its construction in ample time to lay the rails and complete the division before May 5th, 1882, was assured," * * * and " said Portage Company could and would have completed said sixty-five miles of railway before the 5th day of May, 1882, but for the wrongful acts of defendant Omaha Company " (Record, p. 11); which are set forth in the bill (Record, pp. 11–16).

That the defendant and its officers " in or about the month of January, 1882, well knowing the fact that the Portage Company owed a large amount of debts contracted on the faith and security of the land grant, wrongfully conspired to and did injure and defraud the creditors of the Portage Company by preventing the construction of its railway, and by wresting from it its large and valuable land grant " (Record, p. 11); and " falsely represented to members of the Legislature that the Portage Company had made no substantial progress toward the construction of said land grant division, and had never had any considerable number of men at work thereon, and was wholly without means or credit to prosecute such; that it had at last voluntarily and finally abandoned all attempt to construct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon the Legislature of Wisconsin, relying on these false representations, and without inquiry or hearing, hurriedly passed the Act of February 16th, 1882" (Laws 1882, p. 11), forfeiting the grant of these lands to the Portage

same be subjected to the payment of her said judgment, and for general relief.

(The acts of the legislature above referred to are appended to this brief.)

ARGUMENT.

I.

Under the Acts of 1856 and 1864, making a grant of the lands to the State of Wisconsin, Congress made it a condition precedent to the power of the State to sell or dispose of these lands that the road, in aid of which they were granted, should be constructed, and the fact of such construction authenticated by the required certificate of the Governor. Inasmuch as the Portage Company never constructed any road, it never earned the lands, and never had any right to or title in them. Such right and title could only be acquired by the performance of the condition precedent, which was never performed; hence, the appellant's judgment could not have been satisfied out of the lands, even if the State had never forfeited the grant or had never granted the lands to the Omaha Company.

The express allegation of the bill (Record, p. 5, fol. 8), as well as the contention of appellant, is that the act of the Wisconsin Legislature of March 4, 1874, was

a grant of said lands *in presenti*, vesting the legal title thereto in the Portgage Company at once, and that the construction of the road was merely a condition *subsequent*; that the company had under the State Acts of 1874 and 1878 (hereinafter referred to) until May 5th, 1882, within which to perform the condition, and that by the act of February 16th, 1882 (repealing the Act of 1874) the State made such performance impossible, and therefore relieved the company therefrom.

The distinction between conditions precedent and subsequent is that if the estate is to be created or enlarged upon the performance, it is a condition precedent, but if the condition is to defeat an estate an estate already vested, it is a condition subsequent.

Tiedeman on Real Property, Secs. 271, 273, and notes.
4 Kent's Com. (13th Ed.), 124–5.

To understand, therefore, the nature of this condition, it is necessary to consider not only the language of the act of the Wisconsin Legislature, but also the provisions of the Acts of Congress making the grant to the State. It is true in this case, as in the case of Schulenberg vs. Harriman that the act of the Wisconsin Legislature is in form a grant *in presenti*, but the State was not the owner of the lands; it held them in trust for a specific purpose, and the United States in granting them to the State had, of course, the right to limit the estate granted, and to impose on the trustee any condition or limitation on the power of alienation that the grantor saw fit to prescribe or annex.

Schulenberg vs. Harriman, 21 Wall., 59.
Farnsworth vs. R. R. Co., 92 U. S., 49–65.

The United States accordingly did in the Acts of 1856 and 1864, making the grant to the State, annex conditions and limitations on the grant, and the State accepted the trust "upon the terms, conditions and restrictions contained in said Act of Congress" (Laws of Wisconsin, 1856, Chap. 118), and agreed to execute said trust "pursuant in all things to the terms, limitations and conditions of said act" (Laws of Wisconsin, 1865, p. 689), of all of which the Portage Company, as well as the appellant, and every one under whom the appellant claims, had, of course, full notice.

The Act of Congress of June 3, 1856, granting the lands to the State, provided:

"That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and shall be applied to no other purpose whatsoever."

And that "said lands hereby granted to said State shall be subject to the disposal of the Legislature thereof for the purposes aforeraid, and no other, * * * and shall be disposed of by said State only in the following manner, that is to say: That a quantity of land, not exceeding 120 sections, and included within a continuous length of twenty miles of road, respectively, may be sold, and, when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of lands hereby granted may be sold, and so, from time to time, until said roads are completed; and, if said roads are not completed within ten years, no farther sale shall be made, and the lands unsold shall revert to the United States" (11 Stat., 20, 21).

And the subsequent Act of May 5, 1864, granted to the State for the purposes of aiding in the construction of said railroad, four additional sections per mile, "upon the same terms and conditions as are con-

tained " in the Act of 1856, and further provided that :

" Whenever the company to which the grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroad, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to said company entitled thereto, on each side of said road, so far as the same is completed, and continuous with said completed section, not exceeding the amount aforesaid ; a patent shall in like manner issue as each twenty miles of said road is completed. *Provided*, however, that no patent shall issue for any of said land, unless there shall be presented to the Secretary of the Interior, a statement, verified on oath or affirmation by the president of said company, and certified by the Governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this Act, and set forth with certainty the points where such twenty miles begin and where the same ends, which oath shall be taken before a court of record of the United States. * * * That, if said road is not completed within ten years from the passage of this Act as provided herein, no further patents shall be issued to said company for said lands, and no farther sale shall be made, and the lands unsold shall revert to the United States " (13 Stats., 66).

As these Acts of Congress are the only source and measure of the authority of the State in the premises, it is clear that the building of the road was a *condition precedent* to the *power* of the State to dispose of part with the title to or encumber the lands, and so this court, construing these very acts when that was the exact question before it, has held—we refer to Schulenberg vs. Harriman, in which Mr. Justice FIELD speaking for the Court, said :

" The Acts of Congress made it a *condition precedent* to the conveyance by the State of any of these lands,

that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, *the road not having been constructed, could pass any title to the company.*"

Schulenberg vs. Harriman, 21 Wall., 44–65.

And in a later case this Court said:

"The evident intention of Congress was to reserve the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first 120 sections. The act made the construction of a portion of the road a *condition precedent to the conveyance of any other parcel by the State. Any conveyance in disregard of this condition could pass no title.* It was so held by this Court in *Schulenberg vs. Harriman*, 21 Wall., 44, when we had occasion to consider a statute identical in terms with the one before us. The Act of May 22d, 1857 (identical with the act of the Legislature of the State of Wisconsin, referred to here), passed in advance of any work on the road, conveyed, therefore, no title to the Minnesota and Pacific Railroad Company in the lands granted by Congress, beyond the first 120 sections. Of course the mortgage and deed of trust subsequently executed by that company, so far as it covered such lands, was inoperative for any purpose."

Farnsworth vs. R. R. Co., 92 U. S., 50, 51.

Both the acts of Congress and of the State make the construction and completion of the railroad or a twenty-mile section thereof a condition precedent to the acquisition of any right or title to the lands. Accordingly, the United States by the above-mentioned granting Act of May 5, 1864, authorized the State to issue patents conveying the right and title to these lands, whenever (but only whenever) it should be made to appear "by a statement verified on oath or affirmation by the president of the company and certified by the Governor of the State" that sections of twenty consecutive miles of the road were completed, "with all

necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, *equipments, furniture and all other appurtenances of a first-class railroad.*" This was a limitation on the power of the State to dispose of or encumber them prior to such completion, and, accordingly, the State expressly provided in the above-mentioned Act of March 4, 1874 (Sec. 8), that the Portage Company should "construct, *complete and put in operation* that part of its said railway," within the time specified, or forfeit all rights. And conforming to said Act of Congress, the State by Sec. 9 of the Act of 1874 authorized patents to be issued and delivered by the Governor to the Portage Company for lands only upon "the presentation to him of satisfactory proof that twenty continuous miles have *been completed in accordance with said acts of Congress and this act.*" That is to say until such completion the right and title to the lands remained in the State.

These principles and authorities are conclusive answers to the appellant's allegation and contention that the Act of Wisconsin of March 4, 1874, was a grant *in præsenti* to the Portage Company, as a condition subsequent, and for manifest reasons, even a court of chancery cannot relieve against a precedent condition unperformed.

4 Kent Com. (13th Ed.), 126.
Davis vs. Gray, 16 Wall., 203, 229, 230.
Wells vs. Smith, 2 Edward's Ch., 78.

The contract which it is alleged was entered into with Angle was "for the construction" of that part of the line which it is alleged was by the terms of said contract to be completed on or before "the time when the grant of said land to said "railway company by the Legislature of Wisconsin

" would expire " (Record, p. 6). And it is alleged that said Angle under his said contract

" entered upon the work of construction and made " such progress therein that on the 20th day of Jan- " uary, 1882, it had become and then was an assured " fact *that said railway would be completed* by him ac- " cording to the terms of said contract and of the grant " of the Legislature of Wisconsin, on or before the 5th " day of May, 1882, so as to comply fully with the " conditions of said grant " (Record, p. 6). And that " said Portage Company *could and would have com-* " *pleted said sixty-five miles of railway* before the 5th " day of May, 1882, but for the wrongful acts of " the Omaha Company " (Record, p. 11). And that the Omaha Company " on the 10th day of January, " 1882, when it had become obvious that, if let alone, " the Portage Company *would complete its land-grant* " *division* before May 5th, 1882,"

did certain things to prevent such completion (Record, p. 11). But it is nowhere alleged that the Portage Company could or would, before May 5th, 1882, or at any other time, *have put this road into operation, or done those other things that were expressly made conditions precedent* to its right or title to any of the lands.

It is to be noted that it is not claimed that any part of these lands, to which the present bill relates, are part of the 120 sections which the State was authorized to convey in advance of construction.

The Portage Company not having constructed any part of the road, whose construction was made a condition precedent to the right or power of the State to dispose of the land, it never earned the lands, and never had any interest in or right to them; consequently, the appellant's judgment against it could not be a lien on them, even if they had not been conveyed by the State to the Omaha Company, which earned them by constructing and putting in operation the sixty-five miles of railroad to the City of Superior.

If we are right in this view, the bill does not state any ground of relief, since, in any view of the law, a person cannot be converted into a trustee on the ground of fraud unless the Court "can see with reasonable certainty that the fraud is the means of depriving the plaintiff of the property which he seeks to follow."

Collins vs. Sullivan, 135 Mass., 461–3.

Such is the necessary result, if the actual construction of the road is a condition precedent to the power of the State to sell, encumber or dispose of the lands. But, even if we were mistaken in this position, and if it were true that under the Acts of Congress the State might in advance of construction make a provisional or conditional grant of the lands to the Portage Company, and that it did make such grant upon a condition subsequent, that condition being the construction and putting in operation its railway within a specified time, the result under the terms and conditions of the grant by the State to the Portage Company, and, under the facts of this case, is equally fatal to the right of the Portage Company to the lands, and, of course, to the right of any one claiming under the Portage Company whether by grant from that company or by judgment against it.

II.

Both of the conditions upon which the land grant in question was conferred by the State Act approved March 4, 1874 (Chap. 126), upon the Portage Company having been broken by that company prior to the Forfeiture Act of February 16, 1882, the power of the State to pass that act was clear and unquestionable. Its effect was to vest in the State the title free, clear and absolute, as against the Portage Company, and the State having conferred the said lands upon the Omaha Company which earned the same by constructing and building the road, its title thereto is clear and unquestionable, and said Omaha Company acquiring said lands by grant directly from the State and not as assignee of the Portage Company, it holds the same by a title as firm and clear as the State itself held them. The complainant, as a judgment creditor of the Portage Company, can have, in any event, no greater rights or equities in respect to these lands than its judgment debtor had at the date of the Forfeiture Act of February 16, 1882.

What, then, were the rights of the Portage Company to the said lands at the date of the forfeiture act of February 16, 1882? Here the parties widely differ. The bill of complaint is bottomed on the proposition that the Portage Company, at the date of the Forfeiture Act of 1882, was not in default, but had the right, down

to the 5th day of May, 1882, to complete the sixty-five miles of road in question, and that such completion would have given it title to the land grant appertaining to said sixty-five miles; and the wrong complained of is that the alleged fraud and conspiracy on the part of the Omaha Company in January and February, 1882, prevented the Portage Company from complying with the conditions of the land grant and thereby prevented it from earning and acquiring the said lands. This proposition the Omaha Company denies in toto.

In 1856 and 1864 Congress made land grants to the State of Wisconsin intended, among other things, to secure a railway connection between the waters of the St. Croix and Mississippi Rivers at or near the vicinity of Hudson and the waters of Lake Superior at the town of Bayfield and the west end of Lake Superior, which railroads when built would connect with a system of railways running through the State of Wisconsin and thus connect the Wisconsin railway system with Chicago and the East. Nearly fifteen years from the passage of the original Act of Congress of 1856, and ten years from the passage of the amendatory Act of 1864 had elapsed and nothing had been accomplished in the way of building the road from Hudson to Bayfield and Superior.

The Act of March 4, 1874, and Its True Construction and Effect.

In this condition of affairs the Legislature dealt with the subject in the act approved March 4th, 1874 (Chap. 126). This act in connection with the extension act of 1878 is the sole foundation of any right or claim on behalf of the Portage Company

to the land grant. It therefore requires to be examined with care. By the act of March 4, 1874, the original grant was severed, and that portion of the grant from Lake St. Croix, or, for convenience, let us say the City of Hudson to Bayfield on Lake Superior, was conferred upon the North Wisconsin Company, which afterwards became the present Omaha Company, the appellee in this suit. This, it will be noticed, only provided for a railway connection between Hudson and Bayfield; but the said Acts of Congress contemplated that there should be a railway connection with the west end of Lake Superior, or, let us say, for convenience, Superior City. To attain this the said Act of March 4, 1874, conferred upon the Chicago and North Pacific Air-Line Railway Company, whose name was afterwards changed to the corporate name of the Portage Company (Record, p. 5), the lands applicable to the 65 miles of railroad now in question, upon certain conditions, which are set forth in the 8th section of that act. The text of that section is so important that we here reproduce it. It is as follows :

"SECTION 8. There is hereby granted to the Chicago and Northern Pacific Air Line Railway Company [*i. e.*, the Portage Company] all the right, title and interest which the State of Wisconsin now has or may he reafter acquire in or to that portion of lands granted to said State by said two Acts of Congress, as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said [Portage] company shall construct, complete and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the City of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein pro-

vided, and shall also construct and put in operation the railway of said company from Genoa northerly at the rate of twenty milesper year."

The said grantee, the Chicago and Northern Pacific Air-Line Company, that is, the Portage Company, had a charter to build a railroad from the City of Chicago to Genoa, in the State of Wisconsin and from the town of Genoa, thence by way of Portage, at the west end of Lake Superior, connecting on the one hand with railway lines running to Chicago and the East, and on the other connecting with Lake Superior on the north. The right to build the sixty-five miles in question between Superior Junction (on the Hudson and Bayfield line of the Omaha Company) and the west end of Lake Superior and to earn the land grant applicable thereto, was conferred by the said Section 8 of Act of 1874 upon the Portage Company. The scheme or purpose of the Legislature by this legislation was to secure a direct and continuous line of railway from the west end of Lake Superior and from Bayfield to the East through the State of Wisconsin. The Legislature could have granted the right to build this Superior branch, as well as the Bayfield line to the Omaha Company, but it chose to confer the right to build the branch to Superior, on specified conditions, upon the Portage Company. We might, *a priori*, suppose that it would not have conferred the right to build the Superior branch on the Portage Company, without provisions to secure the early completion of a through route from the west end of Lake Superior to Chicago. Accordingly, it will be seen that the scheme of the said Act of 1874 was that the road of the Omaha Company from Hudson to Bayfield and road of the Portage Company from Genoa northward, and particularly from

Superior Junction to the west end of Lake Superior, should make parts of a railway system intended to secure the commerce and travel from Superior and Bayfield and the great lakes southerly through the State of Wisconsin, and thence to the East, instead of permitting it to go by the lakes to Duluth, and thence to St. Paul, whereby the benefit thereof would be lost to the State of Wisconsin. In 1874 the Chicago and Northwestern Company had a railway constructed from Chicago to Hudson, and nothing was wanting to complete the connection with Chicago and the East, through Wisconsin, to and from Bayfield and Superior and the great lakes except the building of the lines respectively by the Omaha and Portage Companies as provided for in the Act of 1874. In the timely completion of both the line from Hudson to Bayfield, by the Omaha Company, and the line from the Junction to Superior, by the Portage Company, the State was vitally concerned.

In this situation the Legislature, by Section 8 of the Act of 1874, above quoted, made the grant to the Portage Company of the lands appertaining to this sixty-five miles of road, expressly setting down the terms and conditions of the grant as follows:

"This grant is made upon the express condition that the said company [*i. e.*, the Portage Company] shall construct and put in operation that part of its said railway abvove mentioned [that is, the sixty-five miles from Superior Junction to Superior City], as soon as a railway shall be constructed and put in operation from the City of Hudson to said point of intersection [the aforesaid Superior Junction], and within five years from its acceptance of the lands as herein provided, and shall also construct and put in operation the railway of the said company from Genoa northerly, at the rate of twenty miles per year."

The contingency was foreseen that the Omaha Company might, as in fact actually happened, construct its railway from Hudson to the Junction or even to Bayfield, and be obliged to wait for an indefinite or long period for the completion of the sixty-five miles necessary to give it an outlet to Superior, and necessary to give Superior the benefit of railway communication, unless some provision were made fixing the time within which the Portage Company should be compelled to complete the said sixty-five miles. And as the legislative purpose was to secure for the State of Wisconsin additional railway communication, it required of the Portage Company upon which it conferred the land grant applicable to the sixty-five miles as an "express condition" of the grant, to complete the branch between Superior City and Superior junction "as soon as" a railway should be completed from Hudson to Superior junctirn, and at all events within five years, and also to go forward with the completion of its railway from Genoa northerly, at the rate of twenty miles per year.

Not only can effect be given to both provisions as to time of completion of the Superior branch; *i. e.*, to the "as soon as" clause as well as to the "five-years" clause, but the fundamental contention of the plaintiff that the act gave five years absolutely—*i. e.*, until May 5, 1879—to build the road from Superior City to the junction, irrespective of and without any reference to the fact that meanwhile a road should be completed by the Omaha Company from the City of Hudson to the junction, we say this fundamental contention of the plaintiff, on which the whole bill rests, necessarily strikes out of the act, not a single word only, but the whole of the following important clause:

"*As soon as the North Wisconsin Road [Omaha Company] shall construct and put in operation its line from the City of Hudson to said point of intersection.*"

If the legislature had meant, as now claimed by the plaintiff, to give five years absolutely, and without any contingency, all that it was required to say—all that it could or would have said—to the Portage Company was: "You shall build your 65 miles of road from Superior City to the junction within five years;" all of the "as soon as" clause would be wholly uncalled for, misplaced and irrelevant. Is this not so? Why was the "as soon as" clause put in? It tells its own story. It is not ambiguous. It was adopted to secure to Superior City, then rising into great importance, a railway connection with the rest of the State at as early a period as practicable to get this, and it was most reasonable to require it to be furnished by the Portage Company as soon as the Omaha Company should build the much-longer distance from Hudson to the junction. On no other conditions or terms can we suppose that the Legislature would have severed the grant and given to the Portage Company this sixty-five miles of land grant in order to form the important rail connection with Superior City. It therefore said to the Portage Company:

"We will give you the land grant for the Superior City branch, and will deny it to the Omaha Company, but only on the 'express condition' that you shall build it to the junction as soon as the Omaha Company shall build its road to the junction, so as to give the State railway communication to and with Superior City just as soon as practicable, and also as a matter of justice to the Omaha Company; but should that Company and no other build from Hudson to the

junction within five years, you, the Portage Company, shall build this sixty-five miles within five years anyway, so as to be gradually lessening the gap between your land-grant portion and the rest of your line from Genoa northerly, which, as a further condition of the land grant, we also require you to construct at the rate of twenty miles per year."

This is a perfectly intelligible scheme, and no language could be more apt to express it than that found in Section 8 of the Act of 1864.

We have been curious to see what answer could be made to the above view. The only one we percieve in the briefs of the appellant is where, speaking of the "as soon as" clause, they say:

"We think this provision clearly and only means that the [Portage] Company shall enter upon the construction as soon as the line to the point of intersection shall be built, and shall prosecute the work with diligence until the land-grant division be put into operation."

Brief of Messrs. Ewing and Southard, p. .

But this construction is not only inconsistent with the plan and purpose of the Legislature, but it ignores the plain language of the act itself.

That does not say simply that the Portage Company "shall enter upon the construction," but that it "*shall construct, complete and put in operation*" its said road to the junction as soon as the Omaha Company reaches the junction, and not simply that it shall "prosecute its work with diligence" *after* the Omaha Company reaches the junction. Plainly, it was contemplated that these two companies should construct their roads *pari passu*, and that the Portage Company should "complete and put in operation its land-grant division

as soon as the Omaha Company shall construct and put in operation its line from the City of Hudson to said point of intersection," and thus secure railway communication to and with Superior City the sooner, the legislature doubtless thought, by the joint efforts of both companies than if the whole grant had been given to the Omaha Company.

Time ran on, nothing was done by the Portage Company, and the act approved March 16, 1878, extending the time was passed. This act is so important that we give the text of it in full for convenience:

"[Published March 28, 1878.]

"CHAPTER 229.

"AN ACT to extend the time for the construction and completion of the railway of the Chicago, Portage & Superior Railway Company.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The time limited for the construction and completion of the railway of the Chicago & Northern Pacific Air Line Railway Comyany, now the Chicago, Portage & Superior Railway Company, by chapter one hundred and twenty-six of the Laws of Wisconsin for 1874, entitled An Act to confer certain lands upon the North Wisconsin Railway Company and the Chicago Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the state of Wisconsin by its acceptance of the grants of land made by congress by acts approved June 3, 1856, and May 5, 1864, is hereby extended three years.

"SECTION 2. This act shall take effect and be in force from and after its passage and publication.

"Approved, March 16, 1878."

At the date of the passage of this Act of 1878, the

Portage Company had done nothing in the way of construction, either from Genoa northerly or on the land grant portion of its railway from the junction to Superior; nor had the Omaha Company completed the road from Hudson to the junction or Bayfield. The bill of complaint in this case alleges as follows:

"The Omaha Company, in 1880-81, had constructed that part of the line of railway indicated in the Acts of Congress above referred to from the St. Croix River to Bayfield" (Record, p. 7).

And in the report of the Senate Committee, which accompanied the passage of the Forfeiture Act of February 16th, 1882, it is stated,

"that the road from the St. Croix River or Lake [that is, Hudson] to the junction [*i. e.*, Superior Junction] has been completed for over a year, and the Chicago, Portage and Lake Superior Railway Company [that is, the Portage Company] have not completed any portion of the road from the west end of Lake Superior to the Junction, nor have they performed the other condition of the grant requiring them to build at the rate of 20 miles a year from Genoa northerly. That company has held the grant since 1874, and notwithstanding the fact that a portion of the time has been peculiarly favorable to raising money for railway construction, has given the State no railway, and the only evidence that it ever had any vitality is found in a few miles of grade and a thousand or more unpaid laborers.

"It is important that the land grant railway should be speedily completed, and your committee are of the opinion that the land grant should be applied as intended by Congress and agreed by the State, for the completion of the land grant railway, and that the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which owns and operates the main line from the St. Croix River or lake to the Junction, and is completing the branch from the Junction to Bayfield, should be permitted to complete by means of the grant, the remaining sixty-two miles of its main line of railway from the Junction to Superior City."

Nothing is alleged in the bill of complaint in respect of the Portage Company ever building or undertaking to build its line from Genoa northerly or any part thereof. In this respect the bill is entirely silent. Mr. Justice HARLAN says:

"It is conceded that the Portage Company never completed its land grant division; nor did it ever construct any part of the road from Genoa northerly, as required by the Act of 1874."

The bill deals wholly with the land grant portion of the Portage line from the Junction to Superior City, as to which, however, it does not allege that any road was completed, but on the contrary shows that none was completed, and that all efforts to complete it had been abandoned (Record, p. 16).

Now let us look more narrowly into the provisions of section 8 of the Act of 1874, making the grant in question to the Portage Company: FIRST, notice that the grant is a grant upon condition, for the language is, "this grant is made upon the *express condition*," &c. What is the condition? It is thus expressed:

"That the said company [the Portage Company] shall complete and put in operation that part of its said railway above mentioned [from Superior Junction to Superior] as soon as a railway shall be constructed and put in operation from the City of Hudson to the said point of intersection [that is, the said Junction], and within five years from the acceptance of the land herein provided, and shall also construct and put in operation the railway of the said company from Genoa northerly at the rate of twenty miles per year."

These two conditions—one in respect of the completion of the land grant part of its railway, and the other in respect of its building its railroad northerly from Genoa—are united together and both are made an "express condition" of the grant. The grammatical and

logal construction coincides with the obvious legislative purpose.

"If a condition be made in the copulative and consist of divers parts, each part must be observed or the condition will not be performed."
Shep. Touch, 138.

As to Conditions Copulative, see 1 Greenleaf's Cruise, Title 13, page 24, Note B, 1.

In order to comply with these legislative requirements, it was just as necessary that the Portage Company should build the road from Genoa northerly, as required, as that it should build the road from Superior Junction to Superior; both are expressed in the same sentence and in the same language. We shall hereafter show that there is no reason to doubt the power of the State to annex both of these conditions to its grant, and certainly no room to doubt that, having so annexed them and having required the Portage Company to accept them as a condition of obtaining any grant of lands under the Act of 1874, and the Portage Company having accordingly accepted them, we say there is no room to doubt that both of these conditions are valid and effectual, as against the Portage Company which thus accepted them, and upon the complainant and all others who claim under the Portage Company.

Act of March 16, 1878, and Its True Construction and Effect.

Let us now consider the effect of the Act approved March 16, 1878, published March 28th, 1878 (being Chapter 229, Laws of 1878), above-quoted, in full (*ante*, p.), extending for three years the time limited by the Act of March 4th, 1874, for the

construction and completion of the railway of the Portage Company. The Act of 1878 must be considered (1) with reference to its effect upon the time for the construction by the Portage Company of the 65 miles from Superior City to Superior Junction ; and (2) as to its effect upon the time for the construction by the Portage Company of its line from Genoa northerly. It will be noticed that the Act of 1878 refers to both the "construction and completion of the railway" of the Portage Company, and provides that the time limited by the Act of 1874 for "the construction and completion of *the railway* of the Portage Company" (meaning thereby, we submit, every part of its railway —that is to say, the land grant portion between Junction and Superior, and the non-land grant from Genoa northerly) is "hereby extended three years." Section 8 of the Act of 1874, as we have seen made the land grant to the Portage Company upon the "express condition" that it should construct, complete and put in operation that part of its railway between Junction and Superior "as soon as a railway shall be constructed and put in operation from the City of Hudson to said point of intersection" (Superior Junction), and the Act of 1874 gave 60 days within which to accept the same, and the act was, it is claimed by the appellant, accepted May 5th, 1874.

The Portage Company Was in Default in Respect of Its Land Grant Division.

The Act of 1878 does not state when the three years' extension shall begin to run. If the act means three years from the passage of the Act of 1878 for completing the land grant division, that time would expire

March 28th, 1881, eleven months before the Act of February 16, 1882, was passed declaring the forfeiture, and several months before the Angle contract was entered into, or before any attempt was made on the part of the Portage Company to build that portion of its road.

Appellant's counsel admit that the Act of 1878 extends to the land-grant division, but deny that it extends to the non-land-grant division from Genoa northerly. Thus Messrs. EWING and SOUTHARD in their brief state:

"The obvious purpose of the act [of 1878] was to add three years to the end of the five years' limitation for constructing the land-grant division" (Brief, p.).

That is to say, the five years in the Act of 1874 would expire May 5, 1879, and the three years added by the Act of 1878 would expire May 5, 1882. If this be admitted, it does not help the plaintiff's case, for the three years' extension clearly does not apply to the "as soon as" requirement clause of the Act of 1874. The Act of 1878 would extend the time at the utmost to May 5, 1882. And the bill is framed on this theory.

Now, if the Omaha Company should not construct its road from Hudson to the junction till 1880, if three years be added to this, it would give till 1883 to the Portage Company; or, if such road should not be constructed by the Omaha Company till 1881, then the Portage Company would have till 1884 to build its 65 miles, which is so improbable a construction as to be absurd. It is therefore clear that the Act of 1878 did not apply to the "as soon as" clause of the Act of 1874. And hence, notwithstanding the Act of 1878, the Portage Company was left under the very reasonable requirement to build to the Junction by the time the Omaha Company built to the same point.

That requirement, so important to the State and so just to the Omaha Company, is not touched or waived or dispensed with, or attempted to be, by the Act of 1878. That Act was an act of grace and favor. The State got no benefit. The benefit of the Act of 1878 was wholly received by the Portage Company. Such acts are usually drawn up by the beneficiary; and they are construed liberally in favor of the State, and strictly against the grantee of its bounty.

The reason of this rule has been many times stated, and the rule has been many times applied by this Court. In the case of *Dubuque and Pacific Railroad Company vs. Litchfield*, 23 How., 66, this Court (Mr. Justice CATRON delivering the opinion) says:

"We concur with the following citation and reasoning of the plaintiff's counsel, to wit, Lord ELLENBOROUGH, in his judgment in Gilbert vs. Gladstone, 1 East, 675 (an action for Liverpool Dock dues), says: 'If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended.'

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

So, also, in the case of *Slidell vs. Grandjean*, 111 U. S., 412, Mr. Justice FIELD, delivering the opinion of the Court, says (p. 437):

"It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or *the relinquishment of a public interest* and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this Court in many instances in the construction of statutes of this description (*Charles River Baidge vs. Warren Bridge*, 11 Pet., 420, 536; *Dubuque and Pacific Railroad Cowpany vs. Litchfield*, 23 How., 66, 88; *The Delaware Railroad Tax*, 18 Wall., 206). The rule is a wise one: it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

This principle is a familiar one, and there is a long list of other cases to the same effect which it is not necessary to cite.

It is not conceivable that the Legislature meant in the Act of 1878 to waive or dispense with this important requirement and condition of the Act of 1874. On no principle of construction can this be held. Besides which, the circumstances forbid any such construction. The length of the line from Hudson to Bayfield, which was required to be built by the Omaha Company was about 180 miles, and the distance from Hudson to the point of junction was about 100 miles as against 62 or 65 miles required to be built by the Portage Company from Superior to the Junction. Why should the Legislature, by the Act of 1878, be taken to have intended to give to the Portage Company three years after the

Omaha Company had built the hundred miles of road between Hudson and Superior Junction?

The Portage Company had the signal advantage of commencing the construction of its shorter line at Superior, and of water communication by the great lakes for the transportation of rails and necessary supplies; and it is most reasonable to suppose that the Legislature meant always to insist upon the requirement and condition that these 65 miles should be built and put in operation by the Portage Company just "as soon as" the hundred miles between Hudson and the Junction should be built and put in operation by the Omaha Company, whenever that might be—the sooner the better.

Such was the view of the Senate Committee, as may be seen in the report of 1882, which has been before referred to. That report expresses the opinion that it was the plain purpose of the Legislature that the railroad from Superior City to the Junction "should be completed *as soon as* the road was completed from the St. Croix River or lake to the Junction, *and within five years anyway*, whether the road was completed from St. Croix River to the Junction or not." This seems to our mind exceedingly clear and indisputable. The purpose of the Act of 1878 is thus expressed by the committee in their report:

"In 1878, the Legislature added three years to the five years extending the limit of time within which the 62 miles must be completed, regardless of the completion of the road from the river to the Junction, but leaving, in the opinion of the committe, the company plainly bound to complete the railroad from Superior City to the Junction as soon as the road was completed from St. Croix river or lake to the Junction."

They declare, and properly so :

" That any other construction imputes to the Legislature an intention to give to the Portage Company three years after the Omaha Company should have completed its road of over 100 miles to the Junction within which to construct the 62 miles and meet it, which your committee cannot believe was the intention."

This, it seems to us, is clear and indisputable—so clear as not to be fairly debatable.

It is alleged in the bill that the Omaha Company, in 1880–81, had constructed not only that part of the road from Hudson (the St. Croix River) to the junction with this road, but the whole line of road from the St. Croix River (Hudson) to Bayfield (Record, pp. 7 and 8). And there is no averment in the bill showing or tending to show a waiver by the State of the condition that the Portage Company should have this line built by the time that line was built to the junction. Cotemporaneous legislation shows when the Act of March 16, 1878, extended the time of the Portage Company to build this line, that the line from Hudson to the junction had not been built *(see Chap. 223, Laws of Wis., 1876 ; Chap. 218, Laws of Wis., 1877 ; Chap. 213, Laws of Wis., 1878 ; Appendix 10, Chap. 176, Laws of 1880)*.

There is nothing alleged in the bill to have been done that operated as a waiver in this respect. For the authorities are uniform and explicit to the effect that where a condition is a continuing one the waiver of an existing default or a default for any previous year is not a waiver of any subsequent breach. Therefore the waiver by the Legislature of a breach to build any twenty miles for any past specified year does

not waive the condition or operate as a waiver of any subsequent failure to build the required twenty miles. This principle is so clearly settled that we content ourselves with simply citing some of the numerous authorities which establish it.

Bleeker vs. Smith, 13 Wend., 533.
Jackson vs. Allen, 3 Cow., 220.
Doe vs. Woodbridge, 9 Barn. & Cress., 376.
Doe vs. Peck, 1 Barn. & Ad., 420.
Doe vs. Gladwyn, 6 Q. B., 953.
Farwell vs. Easton, 63 Mo., 46.
Alexander vs. Hodges, 41 Mich., 691.
Doe vs. Jones, L. R., 6 Exchq., 498.

It is distinctly alleged in the bill of complaint (Record, p. 7) that the Omaha Company, in 1881, had constructed the railroad from the St. Croix River to Bayfield; and, therefore, if the above view is correct, it is clear that the condition of the land grant to the Portage Company, requiring it to complete from Superior down to the Junction as soon as the Omaha Company had build from Hudson to the Junction, had been broken by the Portage Company a year or more before the passage of the Forfeiture Act of 1882, and even before the Angle construction construction contract had been entered into.

The Portage Company Was in Default in Respect of its Genoa Line When the Forfeiture Act of 1882 Was Passed.

The default in respect of the line from Genoa northerly is equally clear. The requirement by the Act of 1874 as a condition of the grant was that the said Portage Company " shall also construct and put in operation its rail-

way from Genoa northerly at the rate of twenty miles per year." The Act of 1878 extended the time three years. On March 16th, 1878, at the date of the passage of the Act, the Portage Company had failed to build twenty miles by May 5, 1875, had also failed to build twenty miles by May 5, 1876, also twenty miles by May 5, 1877. When thus in default for three years, the Legislature passed the Act of March 16th, 1878, extending for three years, the time limited by the Act of 1874. This had the effect probably to waive all breaches and defaults by the Portage Company which had then occurred, but the conditions of the grant remained unrepealed and otherwise unaffected. The authorities last above cited are conclusive on this point.

As to the effect of the Act of 1878 upon the Genoa Line, there are three possible views only, under each of which the Portage Company was in default at the date of the passage of the Forfeiture Act of February 16th, 1882 : (1) That the Act of 1878 gave three years from its approval or taking effect to build the first twenty miles from Genoa northerly. That view is most improbable. (2) That it gave three years from the time limited in the Act of 1874 to build the first twenty miles from Genoa northerly. The time fixed in the Act of 1874 for the construction of the first twenty miles would have expired May 5, 1875, and this construction would give till May 5, 1878, to build the first 20 miles, and so on by a section of 20 miles each year thereafter. This view consists with the language and policy of the act.

If either of these views is correct, the Portage Company was in default when the Forfeiture Act of February 16, 1882, was passed.

Now, let us examine the question from the appellant's position on this point. Appellant's position is that the Act of 1878 has no application to the line from Genoa northerly.

"This act," they say, "extended the time to build the land-grant division, and took no notice of any alleged breach as to the Genoa branch" *(Brief of Messrs. Lamb and Jones, p. 25).*

And the same position is taken by Messrs. Ewing & Southard in their brief (p.).

This is fatal to the plaintiff's case; for if the Act of 1878 did not apply to the Genoa line, then there was no provision extending the time for the construction of that line as limited by the Act of 1874. And the only effect of the Act of 1878 would be to waive *previous or then existing defaults* as to the Genoa line, but nothing more (see cases cited, *ante*, p.), and hence the Portage Company would have after the Act of 1878 took effect one year from May 5, 1878, and no more, in which to construct the first twenty miles of road from Genoa northerly, and be thereafter required to build each year a section of twenty miles.

Now, not a single mile of the Portage Company's railway from Genoa northerly had been built or even commenced on February 16, 1882, the date of the Forfeiture Act. Therefore, whichever of the above three possible views as to the effect of the Act of 1878 upon the time within which the Genoa line was required to be built is taken, it is certain that the Portage Company was in default in respect thereto at the date of the Forfeiture Act, and had been for a long period of time.

The Senate Committee was, therefore, right in their view in the above-mentioned report when they added:

"Nor has that [the Portage] company performed the other condition of the grant requiring them to build at the rate of 20 miles a year from Genoa northerly."

The Condition to Build the Genoa Line Was Authorized, and Is Valid and Effectual.

The complainant has sought to avoid the effect of the admitted breach of the condition to construct the line from Genoa northerly, at the rate of 20 miles each year, by insisting that that condition was one which the State had no right to impose, and that it is, therefore, void. This position is untenable on several distinct grounds:

(a) The condition imposed on the Portage Company by the Act of 1874 to build the 65 miles between the Junction and Superior City, and also from Genoa northerly at the rate of 20 miles a year, is imposed not only by the same act, but in the same sentence. It appears from the Senate Report, as part of the legislative history of Wisconsin, that this condition as to the building from Genoa northerly was deliberately imposed by the Legislature as part of its policy. Why might it not be imposed? It did not contemplate or provide for any diversion of the lands from the land grant portion of the road.

Under the Acts of Congress, approved June 3, 1856, and May 5, 1864, the State of Wisconsin had the power to decline to grant the lands in question to the Portage Company, and to make such grant to some other railroad company. *A fortiori* the State had the power, *if* it granted the lands in question to the Port-

age Company, to annex such conditions as it chose, not contrary to the express provisions of the Acts of Congress. In short, as the State had the power to refuse *absolutely* to make the grant to the Portage Company, *a fortiori* it had the power to make the grant *with conditions*. This proposition is so clear as not to need further demonstration. However, the Courts have decided this precise point in similar cases. For example, the legislation of the State of New York empowers municipalities to grant their consent to the construction of railroads in their streets, and the Courts have several times held that, as the municipalities may refuse such consent altogether, they may, in granting their consent, impose such conditions, not contrary to the express provisions of law, as they may deem advisable.

The Mayor vs. Troy, &c., Railroad Company, 49 N. Y., 657.
People vs. Barnard, 110 N. Y., 548.
See, also, *Indianapolis, &c., Railroad Company vs. City of Lawrenceburgh*, 34 Ind., 304.

The power of the State of Wisconsin, therefore, to impose the conditions upon the Portage Company is perfectly clear.

(b) The Act of 1874 (the sole source of the grant to the Portage Company), by its 12th section provided that that company

"shall, within 60 days from and after the passage of this act, file with the Secretary of State a resolution, duly adopted by the Board of Directors, accepting this grant upon the terms and conditions herein contained."

It made that acceptance. Now, if the condition as

to the building of the line from Genoa northerly is void, yet that condition being an essential and controlling consideration with the Legislature of the grant to the Portage Company, the effect would be not simply to eliminate the requirement to build from Genoa northerly, but to defeat the whole grant, because it is clear that otherwise the Legislature would not have made the grant to the Portage Company.

The Portage Company, by accepting, conformably to the requirements of the 12th Section of the Act of 1874, by resolution duly adopted by the Board of Directors, the grant "upon the terms and conditions therein contained," is estopped from questioning the validity of those conditions. Only the United States, if anybody, could make that objection. For this conclusion the case of *Baker vs. Gee*, 1 Wallace, 333, is decisive. There Congress granted lands to Missouri for *railroad purposes and no other*. The State, without any authority from Congress, provided for allowing settlements by pre-emption where the improvements and occupancy had been made on the lands prior to the date of the grant by Congress. It was held that the United States, as the grantor not objecting, no other party could do so. The Supreme Court, speaking through Mr. Justice DAVIS, says:

"It is contended that the Legislature of Missouri had no power to grant the privileges of pre-emption. If this was a contest between the United States and the State of Missouri, the question of power would be a proper question for examination; but the United States are not complaining, and no other party has a right to complain. If the Act of the Legislature imposed burdens, it nevertheless conferred great privileges, and if any right to object existed, it was waived when the company filed their acceptance with the Secretary of State."

A similar provision as to pre-emptors and settlers was made by Wisconsin in the fourteenth section of the said Act of March 4th, 1874.

An argument may be suggested in answer to the above views, that since, by the ninth section of the Act of 1874, the Governor is authorized and directed, upon presentation to him of satisfactory proof that 20 miles of that part of the railway of said company first above mentioned, *i. e.*, the land grant portion, have been completed, to issue and deliver patents in due form therefor, this shows that it was the intention of the Legislature that the lands should be patented to the Portage Company on the completion of each section of 20 miles of the land grant portion of its road, although it had not complied with the condition to build its line from Genoa northerly. This is a manifest mistake, since the provision in the 9th section above referred to as to patenting the lands proceeds upon the assumption that at the date of the issue of such patents the company receiving them should have been in no default.

The condition of the grant as to building the road from Genoa northerly would still exist, and, if broken, the Portage Company would not, as against the State and the power of the State, be entitled to the lands granted on such condition, whether it be regarded as a condition precedent or a condition subsequent.

The question whether the construction of the road northerly from Genoa was a *condition* of the land grant was not decided by Mr. Justice HARLAN. His observations thereon are as follows:

"As will be seen from the views hereafter expressed touching other questions, it is not necessary to decide

whether the eighth section of the Act of 1874 made the construction by the Portage Company of its road from Genoa northerly a *condition* of the grant to it of these lands, or whether such a condition could have been legally imposed by the State. The Court is inclined to the opinion that if the Portage Company had duly performed the condition prescribed as to the completion of its land-grant division, its right to the lands applicable to that division, and expressly set apart to aid in its construction, would not have been affected by its failure to construct the Genoa branch. But the decision will not be placed upon that interpretation of the legislation in question."

But, for the reasons above given, it seems to us clear that the construction of the Genoa line was a condition of the grant. A further reason for this conclusion is that otherwise this important requirement, though in terms declared an "express *condition*," is without any sanction or means of enforcement. And here we may remind the Court that it has said the doctrine that forfeitures are to be strictly construed does not apply to public grants of this character.

Farnsworth vs. Minn. & Pacific R. R. Co.,
92 U. S., 68.

It is there said :

"There can be no leaning of the Court against a forfeiture which is intended to secure the construction of a work in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by public law"—and it might be added especially, the condition of forfeiture has been voluntarily and solemnly (as in this case) agreed to by the grantee of the State.

Result of Argument as to Breaches of Condition by the Portage Company Summed up.

It thus appears that long before the date when the Angle Construction Contract was made, August 18, 1881, and long before the alleged fraudulent acts of the Omaha Company, and long before the passage of the Forfeiture Act of February 16, 1882, the following plain breaches on the part of the Portage Company of the express conditions of the Act of March 4, 1874, as extended by the Act of March 16, 1878, had occurred, viz.:

1st. The failure of the Portage Company to complete any land grant portion of its road between the Junction and Superior as soon as the Omaha Company had completed and put in operation its road from Hudson to the Junction.

2d. Utter failure to comply in any possible view with the condition to build the road or any part of it, or even commence the construction of the same or any part thereof from Genoa northerly.

The Legislature, therefore, clearly had power, on the the 16th day of February, 1882, to pass the act of that date, entitled "An Act to revoke, annul and resume the grant of lands made by Chapter 126 of the Law of Wisconsin for the year 1874 to the Chicago and Northern Pacific Air Line Railway Company (now the Chicago, Portage and Superior Railway Company), and to repeal Sections 8, 9 and 10 of the said Chapter 126, and to confer said grant of lands upon the Chicago, St. Paul, Minneapolis and Omaha Railway Company."

It was because of these breaches of condition that the Legislature passed the said act declaring the for-

feiture. This fact appears from the report of the Senate committee which accompanied the forfeiture bill. That report states:

"The road from the St. Croix River or lake to the Junction has been completed for over a year, and the Chicago, Portage and Lake Superior Railway Company have not completed any portion of the road from the west end of Lake Superior to the Junction, nor have they performed the other condition of the grant requiring them to build at the rate of twenty (20) miles a year from Genoa northerly. That company has held the grant sine 1874, and notwithstanding the fact that a portion of the time has been peculiarly favorable to raising money for railway construction, has given the State no railway, and the only evidence that it has ever had any vitality is found in a few miles of grade and a thousand or more unpaid laborers.

The public considerations which moved the legislative action in forfeiting the grant to the Portage Company and granting the lands to the Omaha Company are thus stated in the report:

"It is important that the land grant railway should be speedily completed, and your committee are of the opinion that the land grant should be applied, as intended by Congress and agreed by the State, for the completion of the land grant railway, and that the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which owns and operates the main line from the St. Croix River or lake to the Junction and is completing the branch from the Junction to Bayfield, should be permitted to complete, by means of the grant, the remaining sixty-two (62) miles of its main line of railway from the Junction to Superior City."

It thus appears that on the 16th day of February, 1882, the date of the Forfeiture Act, the Portage Company had long been in default in respect of the conditions on which the land grant in question had been conferred upon it. If so, the Legislature had the power to pass that act which ascertained the fact that the

conditions had been broken and reinvested the State with its original right and title in and to the lands as of the date when the forfeiture occurred. This being so, the Portage Company at the date when the Angle contract was made, August 18, 1881, and at the date of all of the alleged acts of fraud on the part of the Omaha Company, January and February, 1882, was without any right or title to these lands, or any interest in them, and, therefore, the whole foundation of the plaintiff's complaint fails. This, indeed, is admitted by the very theory of the bill, which proceeds upon the alleged invalidity of the Forfeiture Act of 1882 and 1883.

We sum up our discussion of this point as follows:

The breaches of condition for which said lands were forfeited having occurred long before the Angle Construction contract was made, and long before the date of the alleged fraudulent acts and conspiracy on the part of the Omaha Company charged in the bill, which breaches of condition on the part of the Portage Company were wholly independent of the alleged fraudulent acts of the Omaha Company, and as to which breaches said alleged fraudulent acts of the Omaha Company in no degree contributed; and as the whole gravamen of the bill is that the Portage Company was wrongfully prevented and disabled from performing the conditions of the grant and earning the lands by the wrong and fraud of the Omaha Company, the necessary consequence is that the whole foundation of the bill fails.

III.

Even if the Act of February 16, 1882, forfeiting the grant to the Portage Company, and granting the lands to the Omaha Company, was premature, and for this reason void, or void because it was procured by the fraud of the Omaha Company practised upon the Legislature (even if it were competent to the plaintiff to aver and prove such fraud, which it plainly is not), or void for any other reason, nevertheless THE CONFIRMATORY ACT OF MARCH 5, 1883 (passed after the date when the plaintiff, by the bill admits that the time for performance by the Portage Company of the conditions of the grant had expired), is valid, and had the effect to extinguish any existing title, interest or right of the Portage Company of whatsoever nature, in or to the lands in question.

It was on this plain ground, without deciding upon the validity of any of the other grounds of defense then and now urged by the Omaha Company, that this cause was determined and adjudged by Mr. Justice HARLAN at the Circuit.

The Omaha Company demurred to the bill for want of equity, which demurrer was, after argument, sustained by Mr. Justice HARLAN, whose opinion in this case is in the Record (p. 67), and a final decree was entered dismissing the bill for want of equity. The ground of this dismissal is stated in the opinion to be "*That the judgment debtor—to wit, Portage Company—*

has no interest in the said lands which can be subjected in satisfaction of the judgment against it" (Record, p. 67). The decree "dismissed the bill on the said demurrer as to the Omaha Company, *and the land grants mentioned in the bill, and all proceeds of the same, for want of equity*" (Record, p. 61).

The Confirmatory Act of 1883 is short, and for convenience, is here given in full:

An Act to confirm the revocation, annulment and resumption made by chapter 10 of the Laws of Wisconsin for the year 1882, and to confirm the grant of lands made by said chapter 10.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The revocation, annulment and resumption made by section 1 of chapter 10, of the Laws of Winconsin for the year 1882, of the land grant mentioned in said section, are hereby fully in all things confirmed.

SECTION 2. The grant of land made by said chapter 10 of the Laws of 1882, to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, is hereby in all respects fully confirmed.

SECTION 3. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed.

SECTION 4. This act shall take effect and be in force from and after its passage and publication.

Approved March 5, 1883.

If the Act of 1883, just quoted, is valid, that is an end of the plaintiff's case, for if any right of any nature whatsoever in and to the lands then existed in the Portage Company, such right was by the Act of 1883 extinguished and forfeited.

Inasmuch as Justice HARLAN put his judgment on this

sole ground without passing upon any other of the defenses made by the Omaha Company, he naturally elaborated it in his opinion, which bears evidence throughout of the most thoughtful and deliberate consideration. It covers the whole subject. We cannot strengthen the argument which he makes in support of his conclusion. Any effort on our part to do so would probably mar it either in substance or expression.

On this point we are content to rest the argument in our case upon the reasoning of that opinion, which, so far as relates to the validity and effect of the Act of 1883, we here reproduce in his own language:

"Nor will it be necessary," says the learned Justice, "to determine the other questions above stated [made by the Omaha Company] nor the question as to the validity of the revocation contained in the Act of February 16, 1882. For if it be assumed that such revocation was a nullity, as impairing the obligation of the alleged contract between the Portage Company and the State, especially because made before the expiration of the period limited for the completion of its road, and while the company was engaged in constructing it; if the mode in which the State disposed of the lands to the Portage Company be conceded to have been consistent with the Acts of Congress; and if the authority of that company to mortgage the lands in order to raise money for the construction of the road be admitted; still, there remain, in the way of granting the relief sought, these stubborn, indisputable facts:

"*First*, That no corporation could acquire, and, therefore, could not pass, an interest in the lands, except subject to the condition prescribed in the act of the State legislature as to the time within which the land-grant division should be completed, and, therefore, subject to the right of the State, in some appropriate mode, to resume its ownership and possession of the lands for any substantial failure to perform that condition;

"*Second*, That the road was not constructed or completed within the time prescribed by the Acts of March, 4, 1874, and March 16, 1878;

"For he says:

"'According to the most liberal construction of the

Act of March 4, 1874, and that of March 16, 1878, the time limited for the construction of that road expired, at least, in May, 1882, eight years after the railway company filed its bond, as required by the ninth section of the Act of 1874. It is conceded that the Portage Company never completed its land-grant division. Nor did it ever construct any part of the road from Genoa northerly, as required by the Act of 1874.'

"*Third*, That, after the expiration of that period, the revocation, annulment and resumption declared by the Act of February 16, 1882, and the grant in the same act to the Omaha Company, were in all things confirmed by the Act of March 5, 1883, which, besides, repealed the latter statutes and all previous acts interfering with or in any manner conflicting with such act of confirmation.

"If the Act of February 16, 1883, was a valid exercise of power by the Legislature, that, plainly, is an end of this branch of the case. But if it was unconstitutional and void, upon any ground whatever, its passage did not, in a legal sense, deprive the Portage Company of the right to proceed with the work of construction, and, by completing the road within the required time, become entitled to receive patents, or to compel any corporation or persons to whom patents were wrongfully issued to surrender the title.

"The validity and effect of the Confirmatory Act of March 5, 1883, does not depend upon the validity of the Act of February 16, 1882; for if the latter act was void, it was clearly within the power of the Legislature, by the Act of 1893—neither the road, nor any twenty continuous miles thereof, having at its date completed by the Portage Company—to withdraw or annul the grant to that company, and to make a new grant of the lands to another corporation.

"The revocation by the Act of March 5, 1893, of the grant to the Portage Company, accompanied by a confirmation, in the same act, of the grant of the same lands to the Omaha Company, were equivalent to a revocation, made, for the first time, on that day, and to an affirmative grant, then, for the first time, to that company. The passage by the legislature, in 1882, of an act that was void did not pre-

vent it from passing a valid act, in 1883, touching the same subject.

"In *Strother vs. Lucas*, 12 *Pet.*, 453, it was said: 'That a grant may be made by a law, as well as a patent pursuant to law, is undoubted (6 *Cranch*, 128); and a confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*.' See, also, *Field vs. Seabury*, 19 *How.*, 323, 324; *Langdean vs. Hanes*, 521, 530; *Slidell vs. Grandjean*, 111 *U. S.*, 412, 439; *Whitney vs. Morrow*, 112 *U. S.*, 693, 695.',

"It results from what has been said that, unless restrained by some legal obligation or contract from revoking the grant to the Portage Company, after the expiration of the time limited for the completion of the road to the west end of Lake Superior, the power of the State to pass the Act of March 5, 1883, cannot be questioned. Were the hands of the State tied by any such obligation or contract? It has already been said that the mere revocation of February 16, 1882, if invalid, did not put the State under any legal obligation to forbear the exercise of any power it had after, and by reason of, the failure of that company to complete its land-grant road within the time stipulated."

In the argument of the counsel for complainant in the Circuit Court in the similar case of the Farmers' Loan and Trust Company vs. The Omaha Company, they contended—we extract their propositions in full—(p. 2 of their brief):

"The right of complainant rests on three propositions, either of which as established by the evidence, is sufficient to entitle it to the relief prayed for, to wit:

"*First.* That the Chicago, St. Paul, Minneapolis and Omaha Railway Company (hereinafter called the Omaha Company), wrongfully and fraudulently prevented the Chicago, Portage and Superior Railway Company (hereinafter called the Portage Company) from complying with the condition of the land grant and caused the grant to be declared forfeited by the Legislature of Wisconsin, and transferred to itself.

"*Second.* That the act of the Legislature of Wisconsin of February 16, 1882, revoking the grant to the Portage

Company, and the Act of March 7, 1883, confirming the revocation, are to be treated as nullities in a court of equity, because by their enactment the grantor prevented the grantee from complying with the condition of the grant.

"*Third.* That the said acts of the Legislature of Wisconsin are null and void, because their effect, if valid, would be to impair the obligation of the contract between the State and the Portage Company."

These propositions are renewed and relied on by the same counsel in the present case in this Court.

Answering these propositions when made in the Circuit Court and holding them to be untenable, Mr. Justice HARLAN thus proceeds:

"Assuming that the completion of the road, within the time limited, was rendered impossible by the act annulling the grant made to the Portage Company, it is contended that the case comes within the familiar rule that 'where a condition subsequent be possible when made, and becomes impossible by act of God or the king's enemy, or the law, or *the grantor*, the estate, having once vested, is not thereby divested by the failure, but becomes absolute,' citing *Coke's Littleton*, 206*a*, 206*b*; 4 *Kent*, 130; *Davis vs. Gray*, 16 *Wall.*, 230-1. This rule cannot be applied to the present case. It is not to be disputed that the revocation of the grant to the Portage Company had an injurious effect upon its credit. But, in a legal sense, such revocation by an unconstitutional, void act of legislation—which the plaintiff affirms the Act of February 16, 1882, to be—cannot be said to have made impossible the performance of the condition upon which the company's title to the lands depended. The attempted revocation by the Legislature in 1882, and the loss by the company of credit in financial circles, do not, in law, hold the relation of cause and effect."

Complainant's counsel had placed great stress upon the case of *Davis vs. Gray* (16 Wall., 203, 230) as supporting their contention. Referring to that case, and further answering the position of the complainant's

counsel now under consideration, Justice HARLAN continues as follows:

"The contrary view [to the one above expressed by Justice HARLAN] is not sustained by *Davis vs. Gray*, 16 *Wall.*, 203, 230. While the Court there recognized the rule excusing the performance of a condition subsequent where performance was rendered impossible by the act of the law, or of the grantor, it was alleged in the bill, and admitted by the demurrer, that the State, by plunging her people into civil war, had herself prevented the railroad company from earning the grant of lands made in aid of the construction of its road. A condition of war, it was conceded, wholly precluded the completion of the road. But, even in that case, performance within a reasonable time was held to be essential to any claim to have the benefit of the grant. Here, there has not been performance by the Portage Company in respect to any part of its land grant division.

"If the Act of 1882 was void, and if, despite its passage, the Portage Company had completed the road within the required time, it would not be disputed by the plaintiff that, as between the company and the State or any other grantee of the State, the equitable title to lands would have been in that company. Its misfortune assuming the representations as to its general financial conditions to be true—was, that it had no credit of consequence except such as it got from the State's grant of lands; a circumstance that cannot control the determination of the question whether the Act of 1882, in a legal sense, rendered it impossible to complete the road in time. If this be not so, it would follow that the Act of 1882 would excuse or not excuse the failure of the Portage Company to complete the road within time, as the evidence was the one way or the other touching its financial ability to have done so, apart from the credit given by the grant of the lands in dispute. But the rule invoked by the plaintiff surely does not rest upon such a shifting foundation. Within that rule, the impossibility to perform a condition subsequent is one arising from some obstacle interposed by the grantor, actually precluding or preventing performance by the grantee, or an impossibility that ensues, as matter of law, from something that the grantor did or caused to be done. There is no claim actual interruption by the officers or agents of the

State of the construction of the road; and, assuming the Act of 1882 to have been unconstitutional, it cannot be true, in any legal sense, that nonperformance of the condition, as to the completion of the road within the prescribed time, resulted from the mere passage of that act."

It will not be difficult to show that if the Act of 1883 is valid, it is, as Justice HARLAN held, fatal to the complainant's case. But, before doing so, let us extract from the appellant's brief the statement of the ground on which, notwithstanding the conceded or scarcely denied validity of the Act of 1883, he relies to obviate the force and effect of the validity of that Act.

The learned and eminent counsel for the appellant says:

"What we do maintain is, that the bribery, corruption and fraud practised by the Omaha Company on the Portage Company and on Angle, directly caused and compelled the forfeiture of the grant by the Portage Company. It directly prevented Angle from completing the railway, and by its fraudulent injunction it directly prevented its completion by any other means, in time to save the grant from being forfeited. Therefore, the lands are thereby subjected to a trust. That is our contention." *(Judge Doolittle's Brief*, pp. 27, 28*)*.

The same position was taken in the Circuit Court, and the counsel is, we submit, mistaken in supposing that it was "overlooked by the learned Judge" *(Ib.*, p. 26*)*. It was not only not overlooked, but considered at length in his opinion and its soundness denied. We refer to the opinion on this subject at length in support of what we have said. We do not deem it needful to set out here more than a few extracts from that opinion:—

"It remains," says Justice HARLAN, "to consider other aspects of the case that have been presented with marked ability by the counsel for the plaintiff.

"It is contended, in substance, that the forfeiture of

the land grant was caused by false representations made to the legislature by the Omaha Company, which desired the transfer of the grant to itself to aid in the construction of its own road, **and that the company by fictitious suits, and by corruptly conspiring with officers of the Portage Company, wrongfully and fraudulently prevented the latter company from performing the condition in respect to the time within which the road was to be completed; consequently, the lands and their proceeds should be subjected by a court of equity to the debts of the Portage Company, secured by its land mortgage.** The principal allegation of the bill as to what the Omaha Company did, is: 'Furthermore, it, and at its instance, others employed by it, and especially the said A. A. Jackson and C. J. Barnes, who were well-known as officers of the Portage Company, and understood to be authorized to speak in its behalf, falsely represented to members of said Legislature that the Portage Company had made no substantial progress towards the construction of said land-grant division, and never had any considerable number of men at work thereon, and was wholly without means or credit to prosecute said work; that it had at last voluntarily and finally abandoned all attempt to construct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon, the Legislature of Wisconsin, relying upon these false representations, and without inquiry or hearing, hurriedly passed the Act of February 16, 1882, above named, to forfeit the said land grant of the Portage Company and confer it on Omaha Company.' "

After referring to *Fletcher vs. Peck*, 6 Cranch, 87, 129, 130, and the many cases, Federal and State, which follow and apply it, Justice HARLAN says:

" For the reasons stated, evidence as to the falsity or truth of representations made by the Omaha Company, or its agents, to the Legislature, or to legislative committees, in respect either of this land grant or of the Portage Company, as well as evidence as to any efforts by the Omaha Company to bring about the revocation of the grant made to the other company, is immaterial

to the present controversy. Such evidence cannot be made the basis of judicial determination without entrenching upon the independence of a co-ordinate department of the government, and impairing its right to proceed, in the exercise of its functions, upon such information as it deems necessary. An adjudication as to rights acquired by individuals under public enactments, based upon an inquiry as to whether those individuals made false representations to the Legislature, or as to whether the Legislature was probably influenced by such representations, is an indirect interference with the power of the Legislature, acting within the limits of its authority, to enact such laws as it deems best for the general good.

"The Courts must, of necessity, presume—whatever may be averred to the contrary—that no general statute is ever passed either for want of information upon the part of the Legislature or because it was mislead by the false representations of lobbyists or interested parties. They must restrict their inquiries to the validity of such legislation. Such is the established doctrine as to Legislative enactments relating to public objects, although a different rule is recognized by some Courts in respect to private statutes alleged to have been procured by fraud practiced upon the Legislature by those claiming benefits under them."

We have quoted the above because, in view of the settled principle which is thus announced, it is all that we deem necessary to say in respect of the alleged fraud practiced upon the Legislature in inducing the passage of the Forfeiture Act of 1882, and its utter immateriality in affecting either that act or the Confirmatory Act of 1883 with invalidity, and because those observations were made by the learned Justice as introductory to those which we next extract relating to the effect, or, more accurately, the want of effect, of the entire congeries of the alleged

frauds of the Omaha Company in subjecting the lands in the hands of the Omaha Company to a trust in favor of the Portage Company or its creditors (see also the case of *United States vs. Des Moines, &c., Co.*, 142 U. S., 510, 544-545).

Discussing this point, Mr. Justice HARLAN thus continues:

"What has been said [as to "the forfeiture of the land grant being caused by false representations made to the Legislature by the Omaha Company"] disposes of the suggestion that the dispersion of the force employed by the Portage Company in the early part of the year 1882 in the construction of its road, the suspension of the work of construction, and its inability to raise the necessary funds for the completion of the road within the time stipulated, was the result of the machinations of agents of the Omaha Company, acting by its authority, and of the corrupt conspiring by those agents with officers of the Portage Company, whereby those officers neglected to do towards the timely completion of the road what, in fidelity to their employers, they might have done. Whether this arraignment of the Omaha Company is justified by the evidence, or whether the Portage Company could, in its weak financial condition in 1882, have completed the road within the required time, if its plans had not been interfered with, in the manner stated, it is not necessary to determine.

"For, as already indicated, if all that is said in respect to the conduct of the Omaha Company were clearly established, the settled principle of law forbid the Court from assuming that the legislative department of the State when it passed the Act of 1882 as well as the Confirmatory Act of 1883 was not in possession of every fact affecting the justice of such legislation. These principles cannot be disregarded in order to remedy the hardships of particular cases. If each member of the Legislature was aware when that act was passed of everything which it is alleged was done by the Omaha Company in regard to this land grant and its rival company, and yet in

discharge of what it deemed a public duty, and in order to secure the speedy completion of a public highway, supposed to be imperatively required by the interests of their constituents, passed the Confirmatory Act of 1883, and thereby selected the beneficiary of the grant made by Congress in aid of the construction of that highway, the conduct of the Omaha Company surely would not constitute any ground why a Court of Equity should attempt to thwart the wishes of the legislative department. THAT IS PRECISELY WHAT WOULD BE DONE IF THE COURT TOOK FROM THAT COMPANY THE BENEFIT OF THE GRANT DELIBERATELY MADE TO IT BY THE LEGISLATURE IN AID OF THE CONSTRUCTION OF ITS ROAD. Legislative enactments, relating to public objects, so far as they confer rights upon individuals, must stand, if they be constitutional, without any attempt upon the part of the courts to conjecture or ascertain what the members of the Legislature would or would not have done under any given state of facts established by extrinsic evidence."

Mr. Justice HARLAN'S opinion that after the Act of 1882, if valid, and after the Confirmatory Act of 1883, it is impossible to recognize any right, trust or equity in the Portage Company to these lands without thwarting the purpose and policy of the Legislature is, as it seems to us, unquestionably sound. On this point it makes no difference whether the grant to the Portage Company was upon a condition precedent or a condition subsequent or whether it was a right to earn the lands on condition of completing the road within the specified time. If not completed within the time limited, such breach forfeited all right of the Portage Company in to or concerning the same.

It is common learning that the effect of the breach of such a condition puts an end to all rights of the grantee, and of all persons claiming under him, and re-invests the grantor with his original estate.

Re-entry by the State for condition broken, avoids not only all estate in the grantee, but also all intermediate charges, incumbrances and conveyances.

McElvey vs. Seymore, 29 N. J. Law, 329.
Barker vs. Cabel, 36 N. H., 344.
Scott vs. Stephen, 12 Ind., 74.
Thomas vs. Record, 47 Me., 500.
Bartlett vs. Jones, 60 Me., 246.
Dolan vs. Mayor, 4 Gill., 494.
Rowell vs. Jewett, 71 Me., 408.
Nicoll vs. N. Y., &c., R. R. Co., 12 N. Y., 121.
Shepard's Touchstone, by Preston, Vol. 1, pp. 121, 125.
1 Washburn, Real Property, 451.

Chancellor KENT says:

"It is a general principle of law that he who enters for a condition broken, becomes seized of his first estate, and he avoids, of course, all intermediate charges and incumbrances."

Kent's Com., Vol. 4, p. 126.

We have shown above (*ante*, p.) that the Forfeiture Act of 1882 and also the Confirmatory Act of 1883 were valid. The effect, of course, was that the State was seized of its original title and estate. Suppose the State, after the breach by the Portage Company, whether that occurred prior to the act of 1882 or prior to the act of 1883, had simply passed an act revoking and annulling the grant to the Portage Company, and had not regranted the lands to the Omaha Company or any one else, would it be contended that the Port-

" of the Legislature, for no other purpose than the con-
" struction of the road, for which they were granted or
" selected, and disposed of only as the work progressed "
[in twenty-mile completed sections]—we say, if such lands were subject to rights, equities and trusts in favor of a prior and defaulting grantee, the purpose of Congress, and of the State as well, would, in the language of Mr. Justice HARLAN above quoted, be effectually thwarted and defeated.

IV.

The construction by the Omaha Company, under the provisions of the Forfeiture Act of 1882, of its road from Superior Junction to the west end of Lake Superior was not a performance of the condition imposed by the Act of 1874 upon the Portage Company to construct a road between said points, and such construction by the Omaha Company does not inure to the benefit of the Portage Company or give to it any right or title to the lands in question.

The Forfeiture Act of February 16, 1882, conferred the lands in question on the Omaha Company upon " the express condition that said Omaha Company shall continuously proceed with the construction of *the railroad now in part constructed by it* between said point of intersection [that is Superior Junction] and the

west end of Lake Superior, and complete the same on or before the first day of December, A. D. 1882." The bill alleges that "in the year 1882, the Omaha Company constructed and put in operation *its* branch to Superior City," and received patents from the State for a large part of the lands granted to the Portage Company" (Record, pp. 16, 17). It was contended by the complainant, at the Circuit, that such construction by the Omaha Company inured to the benefit of the Portage Company, and was, under the circumstances, in effect and in law, a performance of the condition imposed by the State upon the Portage Company, and vested the lands in the Portage Company. Should such contention be renewed in this Court, we cannot better answer it than by adopting the reasons given by Mr. Justice HARLAN for holding that it was untenable. The language of the learned Justice on this point is as follows :

"It is further said, in behalf of the plaintiff, that the Omaha Company became, as early as January and February, 1882, the owner of every share of the capital stock of the Portage Company, and of a large part of its bonded and floating indebedness; that the former company built a road from Mud Lake to Superior City, parallel to and a few yards from the half-graded line of the latter company; and that the road so built was such a one as was described in the Acts of Congress of 1856 and 1864. Upon these facts the plaintiffs rest the contention, that as that road was constructed by a corporation which was the sole stockholder and a principal creditor of the Portage Company, and as the law avoids forfeitures where practicable, the condition imposed by the State may be regarded as having been duly performed, within the rule that 'any one who is interested in a condition may perform it, and when performed, it is gone forever;' citing 2 *Crabbe's Real Prop.*, 815 ; 2 *Washb. Real Prop. (2d ed.), p.* 12, and other authorities.

"The Court is unable to assent to this view, for the reason, if there were no other, that what was done by

the Omaha Company towards the construction of its road to Superior City was not done by it as a stockholder and creditor of the Portage Company. It did not elect or intend, in that capacity, to perform the condition imposed by the State upon the latter company. The record conclusively establishes the fact that in constructing the road to the west end of Lake Superior the Omaha Company proceeded under its own charter and represented its own stockholders, and not the stockholders of the other company. It built its own branch road, and did not complete the road commenced by the Portage Company. It was so understood by the plaintiff; for it alleges in the bill that 'in the year 1882 the Omaha Company constructed its branch to Superior City, alongside of the partially constructed line of the Portage Company, and has ever since operated the same.' And this is consistent with the second section of the act of February 16, 1882, which made the grant to the Omaha Company upon the express condition that it would continuously proceed with the construction of the road then 'in part constructed *by it* between said point of intersection and the west end of Lake Superior," and complete it on or before December 1, 188 . It is impossible to suppose that the Omaha Company ever intended to perform the condition imposed upon the Portage Company in reference to the latter's road. It performed the condition imposed in the act granting these lands in aid of the construction of *its* road. The plaintiff's whole case proceeds upon the theory that the Omaha Company sought to prevent any result that would be beneficial to the other company. It would, therefore, be a perversion of the rule upon which the plaintiff relies, and inconsistent with the entire evidence, to say that the Omaha Company was interested in performing, or intended to perform, or that the State regarded it as performing, the condition in question for or in behalf of the Portage Company. That would make the Omaha Company do something for another corporation which it did not elect to do, and was not bound in law to do."

V.

If the Portage Company, prior to the Forfeiture Act of 1882, had committed a breach of either of the conditions upon which it held the land grant, then such Forfeiture Act extinguished any interest in or lien upon the said lands on the part of the Portage Company; and, if so, the decree dismissing the bill must be affirmed, for there is no ground of relief stated, or possible, against the Omaha Company, except in respect of the land grant obtained by that Company.

The bill of complaint in this case is a creditor's bill *simpliciter* to subject to the payment and satisfaction of the plaintiff's judgment the lands which had been granted, or attempted to be granted, to the Portage Company by the Act of 1874, which were forfeited by the State in 1882, and then conferred upon the Omaha Company.

That such was its character and purpose is expressly stated by HARLAN, J., in his opinion in this case (Record, p. 67). Final decree was entered dismissing the bill for want of equity. The ground of this dismissal was stated in the opinion to be "That the judgment debtor—to wit, the Chicago, Portage and Superior Railway Company—has no interest in the said lands which can be subjected in satisfaction of the judgment against it" (Record, pp. 61 and 67). The decree "dismissed the bill on the demurrer as to the defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company, *and the land grants men-*

tioned in the bill, and all proceeds in the same, for want of equity " (Record, p. 61).

Entirely departing from the scope and purpose of the bill as a creditor's bill to reach these lands or their proceeds, the appellant insists in one of the briefs filed in this Court that the complainant is entitled to a decree ordering the Omaha Company to pay her judgment against the Portage Company, " aside from any interest the Omaha Company afterwards obtained in the land grant " *(Judge Doolittle's Brief, p. 4*, S. P; *Ib., pp. 15, 16)*.

This is manifestly an afterthought, as will be seen by an examination of the allegations, structure and purpose of the bill. This attempt to convert a creditor's bill to reach the land grant in question, and fasten upon these lands a trust for the payment of the plaintiff's judgment, into a proceeding in equity to recover against the Omaha Company in respect of certain alleged torts of that company, perpetrated either upon the Portage Company or upon Angle—in effect, a garnishment in equity for a tort—this attempt, we insist, must certainly fail upon three distinct grounds :

1. There is no such case made, or attempted to be made, or stated in the bill.

This will appear by an analysis of the bill, and will, if necessary, be pointed out at the bar.

The prayer for general relief cannot enlarge the scope of the bill, or entitle the plaintiff to a decree on any grounds except those stated in the bill itself.

Thus, Story, Equity Pleadings, says :

" Sec. 257. And this leads us to remark, in the next place, that every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill ; otherwise, the defect will be fatal. For no

facts are properly in issue unless charged in the bill, and, of course, no proofs can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the Court pronounces its decree *secundum allegata et probata*."

So Daniell says:

"This part of the bill, therefore, should contain an accurate specification of the matters to be decreed; and, in complicated cases, the framing of it requires great care and attention, for, although where the prayer does not extend to embrace all the relief to which the plaintiff may at the hearing show a right, the deficient relief may be supplied under the general prayer, yet such relief must be consistent with that specifically prayed, as well as with the case made by the bill, for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made and take another decree, even though it be according to the case made by his bill."

1 Daniell's Chancery Pleading and Practice (5th Ed.), *378.

See, also, Hayward vs. National Bank, 96 U. S., 611, 614.

2. The bill of complaint is, indeed, full of vituperative epithets of fraud, conspiracy, treachery and bribery on the part of the Omaha Company or its officers, but we deny that when its *statements of specific facts* are carefully examined (and nothing else is material, and nothing else is admitted by a demurrer, see *Fogg vs. Blair*, 139 U. S., 119, and *United States vs. Des Moines, &c., Co.*, 142 U. S., 510, 544) they show any fraud whatever on the part of the Omaha Company which would make it liable to the Portage Company or to Angle in damages, or in any respect whatever. In other words, if an action at law were brought against the Omaha Company, either by the Portage Company

or by Angle, based upon the specific facts stated in the present bill of complaint, such action would fail.

A careful analysis of the facts alleged in the bill will show this position to be well founded. It would consume too much space in the printed brief to go over the allegations of the bill in detail and comment upon them, but if this shall be deemed material, it can be better done on the argument at the bar.

We only stop at this time to point out that one error on this subject runs throughout a large part of the appellant's brief, and that is that the Omaha Company was the "purchaser" of the Portage Company (whatever that may mean); that it was its "assignee" (whatever that may mean), and that it was "the successor to all its stock, rights and franchises, and stands in its shoes" *(Judge Doolittle's Brief, p. 11 and passim).*

But the Omaha Company was simply a shareholder and bondholder in the Portage Company. "Only this and nothing more." If the Omaha Company had held every share of the stock of the Portage Company, the two companies would still be distinct and independent. On this point see Pullman Car Company vs. Missouri Pacific Ry. Co., 115 U. S., 587.

There is nothing whatever in the bill to show a "consolidation" of the two companies, or a "purchase" by the Omaha Company of the railroad and franchises of the Portage Company, and nothing to show that the Omaha Company is "the successor" of the Portage Company or the "assignee" of its property, rights or franchises, or that the Omaha Company would be liable *in personam* for any act wrongful or otherwise done by the Portage Company, or for the liabilities, either in tort or contract, of the Portage Company. On the contrary, the facts stated in the bill

negative any such "consolidation," "purchase," "assignment," "successorship" or "liability," and show that the only relation of the Omaha Company to the Portage Company was that of a holder of its stock and bonds.

It is, perhaps, hardly necessary to add that if we have succeeded in showing in the former portions of this Argument that the Portage Company had forfeited this land grant for *conditions broken prior to the execution of the Angle Contract*, it is legally impossible that the alleged acts of fraud on the part of the Omaha Company caused the loss of the land grant to the Portage Company, or deprived Angle of anything to which the Portage Company had any right or title whatever; and Angle is vastly more remote than the Portage Company, for he was to be paid in money and stock, and even as respects the Portage Company had no right in the lands and no contract purporting to give him a right therein or even to the bonds which the Portage Company had undertaken to secure by its mortgage to the *Farmers' Loan and Trust Company, trustee.*

3. If the facts stated in the bill show any fraud or actionable wrong on the part of the Omaha Company in favor either of the Portage Company or Angle, they are exclusively cognizable in a court of law, and are not within the equity jurisdiction of the Circuit Courts of the United States. This legal proposition we now proceed to consider under the next Point in this brief.

VI.

If the complainant has any right of action against this defendant, a remedy at law is adequate, and therefore the only remedy.

As stated by one of our most able writers on Equity Jurisprudence, "it is a necessary result from the whole theory of creditors' suits that jurisdiction in equity will not be entertained when there is a remedy at law" (2d Pomeroy's Equity, Sec. 1415). The proposition may be broadly stated, that equity jurisdiction depends on two facts—the existence of equitable interests and the inadequacy of legal remedies. When the remedy at law is adequate it is exclusive.

We, therefore, ask attention particularly to the wrongs on part of the Omaha Company complained of, and the proper and only remedy therefor.

It is alleged in the bill:

"Your orator farther submits that even though the said last-named acts of the legislature of Wisconsin [the acts of 1882 and 1883] vested the legal title to said lands in the Omaha Company, yet said company cannot be permitted by a court of equity to hold said lands or their proceeds against the creditors of the Portage Company, because the Omaha Company corruptly and wrongfully, by fraud and through the treachery of the officers of the Portage Company, prevented it from complying with the condition of said grant under the circumstances and in the manner next hereinafter set forth. * * * That the defendant the Omaha Company and one Henry H. Porter and one Ransom R. Cable in or about the month of January, 1882, well knowing the fact that the Portage Company owed a large amount of debts contracted on the faith and security of said land grant, wrongfully *conspired to and did injure and defraud the creditors of the Portage Company* by preventing the construction of its railway and by wresting from it its large and valuable land

grant. *In proof of such conspiracy* the Omaha Company, on the 10th day of January, 1882, when it had been informed that if let alone the Portage Company would complete its said land-grant division before the 5th day of May, 1882, entered into a contract with the Chicago, Milwaukee and St. Paul Railway Company and the Chippewa Valley Railway Company to get control of the Portage Company, &c." (p. 11). * * * And "in pursuance of said conspiracy, on or about the 19th day of January, A. D. 1882, fraudulently induced Charles J. Barnes, then a director and Vice-President, and A. A. Jackson, then a director and General Solicitor of said Portage Company, to join said conspiracy and aid said conspirators in preventing the construction of the railway of the Portage Company, in wresting from it its large and valuable land grant, and in causing the same to be given to the Omaha Company" (p. 12). And "in further execution of said conspiracy the Omaha Company, on the 19th and 20th of January, 1882, at Chicago, Ill., informed the general manager of the Portage Company of the tenor, purpose and effect of said contract (with Barnes and Jackson) of that date, and advised and ordered him to telegraph officially to A. C. Titus, who was the Chief Engineer of the company in charge of the work, &c., to forthwith call in his staff, suspend work," &c. (p. 14).

It will be observed, therefore, that the charge is that the defendant by false representations and fraudulent acts prevented the completion of the road and obtained the land grant, thus injuring the complainant by impoverishing her judgment debtor and making it unable to pay her debt. It is not pretended that she has, or ever had, any lien on or interest in the lands or property which she in this suit seeks to have made subject to her judgment against the Portage Company, except such interest, if any, as a general creditor has in the property of his debtor. It cannot be, nor do we understand that it is pretended, that, if the State had granted these lands to an innocent party when

it granted them to this defendant, such innocent party or the lands could be held for the claim of complainant. The very foundation, therefore, of any recovery against this company is the establishment of the fact that it was guilty of the fraudulent acts complained of. It is a constitutional right to have that question tried by a jury; and the judgment at law in such an action would afford the complainant a perfect remedy (if she is entitled to any remedy), for it is not pretended that the defendant is not solvent and amply able to respond to any judgment against it.

For both of these reasons, therefore, a suit in equity cannot be maintained. The language of Mr. Justice FIELD, delivering the opinion of the Court in Scott vs. Neely, 140 U. S., 106 *et seq.*, is so apposite that we quote briefly from it. In that case the defendant, being liable to the plaintiff (as it was alleged) for moneys lent, conveyed to his wife part of his property in fraud of his creditors. Under the statute of the State in which the suit was brought, the plaintiff not only demanded a judgment for the sum due, but also that the property so fraudulently conveyed should be sold to satisfy such judgment. The defendant contended that it was not a claim for equitable cognizance. Delivering the opinion of the Court, the learned Justice used the following language:

"The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in

the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact (pp. 109, 110). * * * This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;' and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity. * * * All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side (p. 110). * * * In the case at bar, under the statute of Mississippi, there is no amount stated by the defendant as due, which is secured by any lien on property executed by him; and that amount is uncertain, not resting in mere calculation of interest or in the application of credits, but upon proof of the existence and validity of the alleged contract between the parties. In all cases where a court of equity interferes to aid the enforcement of a remedy at law there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding (Smith vs. Railroad Co., 99 U. S., 398, 401; Angell vs. Draper, 1 Vern., 398, 399; Shirley vs.

Watts, 3 Atk., 200; Wiggins vs. Armstrong, 2 Johns. Ch., 144; McElwain vs. Willis, 9 Wend., 548, 556; Crippen vs. Hudson, 3 Kernan, 161; Jones vs. Green, 1 Wall., 330)."

It is the law that when a man does an act which in law and in fact is wrongful, and such as may, as a natural and probable consequence, produce injury to another, and which in the particular case does produce such injury, an action at law will lie against the wrong-doer in favor of the person injured for such damages as the latter may have sustained thereby.

Lumly vs. Gye, 2 E. & B., 216.
Bowen vs. Hall, Law Rep., 6 Q. B. Div., 333.
1 Addison on Torts (Wood's 6th Ed.), 9 & 10.
Clerk & Lundsell's Law of Torts, 13 & 14.
Green vs. Button, 2 C., M. & R., 707.
Cadle vs. Stockton Water W. Co., Law Rep., 10 Q. B., 458.

If the allegations of the bill do not bring this case within this rule, there is *no right of action* stated against the Omaha Company either at law or in equity; but, if the facts *alleged* do bring this case within this rule, an action at law affords not only an ample remedy, but is the only remedy.

Scott vs. Neely, 140 U. S., 106.
Buzard vs. Houston, 119 U. S., 347.
2 Pomeroy's Eq. (2d Ed.), Sec. 944 et seq.
Ib., Secs. 296, 1415.
U. S. vs. Ingate, 48 Fed. R., 251.
New York Guaranty Co. vs. Memphis Water Co., 107 U. S., 205.
Smith vs. Bourbon County, 127 U. S., 105.

The fact that the complainant is a judgment creditor of the Portage Company does not give a court of equity jurisdiction in the present case.

Smith vs. Bourbon County, 127 U. S., 105.

THOMAS WILSON and
JOHN F. DILLON,
For Appellee.

APPENDICES.

APPENDIX No. 1.

ACTS OF CONGRESS.

Act of June 3, 1856 (11 Stats. at Large, 20).

Act of May 5, 1864 (13 Stats. at Large, 66.)

The material parts of these acts will be found in Justice HARLAN'S opinion, reprinted *infra* as part of the Appendix to this brief.

LAWS OF WISCONSIN, 1856.

CHAPTER 118.

An Act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3d, 1856.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. That the lands, rights, powers and privileges granted to and conferred upon the State of Wisconsin by the act of Congress, entitled "An act granting public lands to the state of Wisconsin to aid in the construction of railroads in said state," approved June 3d, 1856, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said

act of Congress, and the said state of Wisconsin hereby assumes and undertakes the trust created by the said act of Congress.

SEC. 2. This act shall be in force so soon as the same is published.

Approved October 8th, 1856.

LAWS OF WISCONSIN, 1865—JOINT RESOLUTIONS.

NUMBER 8.

Joint Resolution accepting the lands granted to the State of Wisconsin by an act of Congress entitled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," approved May 5th, 1864.

Resolved by the senate, the assembly concurring, That the lands granted to the state of Wisconsin for the purpose of aiding in the construction of certain railroads within this state, by virtue of an act of Congress entitled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," approved May 5th, 1864, be, and the same are hereby, accepted by the state of Wisconsin, subject, however, to all the conditions of said act of Congress. And the state of Wisconsin hereby consents to execute the said trust created by the aforesaid act of Congress, pursuant in all things to the terms, limitations and conditions of said act.

Resolved, That the Secretary of State be, and he is hereby, authorized and required to transmit a certified copy of this resolution to the Secretary of the Interior of the United States.

Approved March 20th, 1865.

[Approved March 4th, 1874.]

CHAPTER 126.

An Act to confer certain lands upon the North Wisconsin Railway Company, and the Chicago and Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the state of Wisconsin by its acceptance of the grants of land made by congress by acts approved June 3, 1856, and May 5, 1864.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. There is hereby granted to the North Wisconsin Railway Company [now the Omaha Company] all the right, title and interest which the state of Wisconsin now has or may hereafter acquire in and to the lands granted to said state by acts of congress aproved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St. Croix river or lake, between townships twenty-five and thirty-one to the west end of Lake Superior and Bayfield, except those herein granted to the Chicago & Northern Pacific Air Line Railway Company, [the Portage Company] this grant being for the purpose of enabling the said North Wisconsin Railway Company to [now the Omaha Company] complete the railroad heretofore partially constructed by them from the St. Croix river or lake aforesaid to Bayfield, the said grant being, however, upon the express condition that the said company shall immediately proceed with the construction of said road from the St. Croix river or lake to Bayfield, and shall construct so much thereof the first year as shall with that already constructed, make forty miles, and not less than twenty miles each year thereafter until the entire road is completed.

SECTION 2. The said North Wisconsin Railway Company shall within seven years from the passage of this act, complete said road in accordance with the requirements of said acts of congress, and shall build and complete said road from Hudson, by way of River Falls to Prescott, or some point on the Mississippi

river, in Pierce county, Wisconsin, within seven years from the date of the acceptance of the said grant by the said company, as herein provided, and shall perpetually maintain a freight and passenger depot not more than three-fourths of a mile from the present corporate limits of the city of Hudson.

SECTION 3. The governor is hereby authorized and directed, upon presentation to him of satisfactory proof that the first forty continuous miles of said road have been completed in accordance with said acts of congress and with this act, to issue and deliver or cause to be issued and delivered to said company, patents in due form from the said state, for five hundred and twenty sections of land, and thereafter, upon the completion of any twenty continuous miles, he shall issue and deliver, or cause to be issued and delivered to said company, patents in due form for two hundred sections of said land.

SECTION 4. The said North Wisconsin Railway Company shall, within sixty days from and after the passage of this act, file with the secretary of state a resolution duly adopted by its board of directors, accepting this grant upon the terms and conditions herein contained, and shall also within sixty days execute to the state of Wisconsin and deposit with the state treasurer a bond or undertaking, with two or more sureties, to be approved by the governor, to pay to said state as liquidated damages, the sum of five thousand dollars for each mile of said first forty miles which shall not be completed at the expiration of one year from the passage of this act; and further, to pay to said state as liquidated damages, the sum of five thousand dollars for each mile of the remainder of said road which shall not be constructed in accordance with this act; *provided, however*, that except as to said first forty miles, the said bond or undertaking shall be of no force or effect until congress shall have passed an act renewing said grants, or extending the time for the construction of said railroad, or until it shall have been decided by the Supreme Court of the United States that the present title of the state is absolute and indefeasible. And upon the failure of said company to file said resolution and to give said security, within the time hereinbefore limited, this act shall be of no force or effect whatever, so far as it grants to the said North Wisconsin Railway Company any interest in or right to said grants.

SECTION 5. If the said North Wisconsin Railway Company shall fail to file said resolution and to give said security as provided in the preceding said section, it shall be the duty of the governor, as the agent of the state, to proclaim a forfeiture by said company of all rights and privileges under this act, and thereupon any other railway company that shall first, after said proclamation of forfeiture hereinbefore referred to, file with the secretary of state a resolution of its board of directors accepting said grant upon the terms and conditions of said acts of congress and of this act, and shall deposit with the state treasurer, security as hereinbefore provided for the North Wisconsin Railway Company, approved by the governor, to construct said road in accordance with said acts of congress and with this act, shall succeed to the rights and privileges herein conditionally granted to the said North Wisconsin Railway Company, as fully as though this act had in the first instance applied to said company.

SECTION 6. Upon the presentation to the state treasurer of satisfactory proof that the North Wisconsin Railway Company has completed forty continuous miles of said road, it shall be the duty of the state treasurer, and he is hereby directed and required to pay over to said company so much of the money in the state treasury collected from trespassers on any of said lands embraced in said grant as shall be apportioned to it as herein provided: *Provided*, that none of said money shall be paid over until congress shall have renewed or extended said grant, or the title to said grant shall have become vested in the state.

SECTION 7. It shall be the duty of said railway company to make and have junctions and running connections with any railroads that may or shall cross the same or in any other way connect therewith, and said railway company shall receive grain in bulk or other freight for transportation to any place within this state, and shall receive and transport the grain and other freight so received, and shall transport all passengers that may be transferred to said railroad from roads crossing the same, or which may connect therewith in any other manner, at the same rates that said railway company may charge for grain, freight or passengers received and transported wholly on the line of said road: *Provided* that the said North Wisconsin Railway Company shall have the right to enforce reciprocal obligations on all other roads crossing the same or connecting in

other manner therewith, as to the rates for transporting grain, freight or passengers transferred or received by said road, so crossing or connecting as aforesaid, from said North Wisconsin Railway Company.

SECTION 8. There is hereby granted to the Chicago & Northern Pacific Air Line Railway Company [*i. e.*, the Portage Company] all the right, title and interest which the State of Wisconsin now has or may hereafter acquire in or to that portion of the lands granted to said state by said two acts of congress, as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the land office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly at the rate of twenty miles per year.

SECTION 9. The governor is hereby authorized and directed, upon the presentation to him of satisfactory proof, that twenty continuous miles of that part of the railway of said company first above mentioned have been completed in accordance with said acts of congress and this act, to issue and deliver or cause to be issued and delivered to said company, patents in due form from said state for two hundred sections of said land, and thereafter upon the completion of twenty continuous miles of said railway, he shall issue or caused to be issued and delivered to said company, patents for two hundred sections of said lands, and on the completion of that part of the railway of said company lying between the point of intersection and the west end of Lake Superior, he shall issue or deliver or cause to be issued and delivered to said company, patents for the residue of said lands hereby granted to said company.

SECTION 10. The moneys in the state treasury collected from tresspasses on the lands included in the grants to aid in the construction of a railroad from St. Croix lake or river to the west end of Lake Superior and to Bayfield, and all moneys that may hereafter be

collected by the state from trespassers on said land shall be apportioned by the state treasurer between the said Chicago & Northern Pacific Air Line Railway Company and the company or companies to whom the residue of the said lands shall be granted, in proportion to the number of acres granted to each, and upon the presentation to the state treasurer of satisfactory proof that the said Chicago & Northern Pacific Air Line Railway Company has completed twenty miles of its railway between said point of intersection and the west end of Lake Superior, as required by this act, it shall be the duty of such treasurer, and he is hereby directed to pay over to said company so much of said moneys collected from trespassers as shall be apportioned to it.

SECTION 11. All lands conveyed to said Chicago & Northern Pacific Air Line Railway Company by the state in pursuance of this act shall be subject to taxation from the date of the conveyance thereof, by the state.

SECTION 12. The said Chicago & Northern Pacific Air Line Railway Company [*i. e.*, the Portage Company] shall, within sixty days from and after the passage of this act, file with the secretary of state a resolution duly adopted by the board of directors, accepting this grant upon the terms and conditions herein contained, and shall also, within said sixty days, give to the state of Wisconsin such security for the completion of that portion of its railway lying between said point of intersection and the west end of Lake Superior, in accordance with the provisions of said acts of congress and this act, as shall be required by the governor: *Provided, however*, that said security shall be of no force or effect until congress shall have passed an act renewing said grants or extending the time for the construction of said road, or until it shall have been decided by the Supreme Court of the United States that the present title of the state is absolute and indefeasible; and upon the failure of said company to file said resolution and to give the said security within the time hereinbefore limited, this act shall be of no effect so far as it grants to said company any interest in or right to said lands.

SECTION 13. If said Chicago & Northern Pacific Air Line Railway Company [*i. e.*, the Portage Company] shall fail to file said resolution and to give security, as

provided by the preceding section, then said land shall vest in the North Wisconsin Railway Company [*i. e.*, the Omaha Company], upon the company filing with the secretary of state a resolution of its board of directors, and executing and delivering to the state treasurer a bond, as required by section four of this act; and in case the said North Wisconsin Railway Company shall fail to file such resolution and to execute and deliver such bonds within twenty days after the forfeiture of its rights to said lands [by] the said Chicago & Northern Pacific Air Line Railway Company, then it shall be the duty of the governor, as the agent of the state, to proclaim a forfeiture by said company of all its rights and privileges under this act, and thereupon any other railway company that shall first, after said proclamation, file with the secretary of state a resolution of its board of directors accepting said grant upon the terms and conditions of said acts of congress and of this act, and shall deposit with the state treasurer security, to be approved by the governor, to construct said road in accordance with the provisions of said acts of congress and of this act, shall succeed to the rights and privileges herein conditionally granted to said Chicago & Northern Pacific Air Line Railway Company, as fully as though this act had in the first instance applied to said company.

SECTION 14. Any person who, prior to the first day of January, 1874, may have settled upon any quarter, or a subdivision less than a quarter-section of said lands, and improved the same as a farm, and who has since continued to reside thereon and occupy the same as his home, may, on proving such settlement, improvement and continued residence, acquire the title to the same by paying to the state treasurer of Wisconsin, for the use of the said North Wisconsin Railway Company, the sum of two dollars and fifty cents per acre for such land, such proof and payment to be made within one year from the passage of this act.

SECTION 15. This act shall take effect and be in force from and after its passage and publication.

[Approved March 4, 1874.]

LAWS OF WINCONSIN, 1876.

CHAPTER 223.

An Act to extend the time for the construction of the North Wisconsin Railway, and to waive the forfeiture incurred by the North Wisconsin Railway Company by its failure to construct twenty miles of its road during the year 1875.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The time fixed and limited in and by chapter 126, of the general laws of 1874, entitled, "An act to confer certain lands upon the North Wisconsin Railway Company, and the Chicago and Northern Pacific Air-Line Railway Company, and to execute the trust assumed by the State of Wisconsin by its acceptance of the grant of land made by Congress by acts approved June 3rd, 1856, and May 5th, 1864," for the construction of the road mentioned in the second section of said chapter, is hereby extended one year; *provided, however*, and this act is upon condition that within sixty days from and after the publication of this act, the sureties upon the bond executed to the state by the North Wisconsin Railway Company, under the provisions of section 4, of chapter 126, of the general laws of 1874, shall file with the state treasurer a written consent, under seal, to said extension of time, but if any of said sureties decline to sign said consent, then it shall be sufficient if such number thereof shall so consent as in the opinion of the Governor shall efficiently protect the interest of the state on said bond; *provided, further*, that such consent shall not be construed as creating any other, different or greater liability on the part of those so consenting, than is provided in said section 4, under which said bond was executed.

SECTION 2. The forfeiture incurred by the North Wisconsin Railway Company by its failure to construct twenty miles of its road during the year 1875, as required by said chapter 126, of the general laws of 1874, is hereby waived by the state of Wisconsin.

SECTION 3. This act shall take effect and be in force from and after its passage and publication.

Approved March 9, 1876.

LAWS OF WISCONSIN, 1877.

CHAPTER 218.

An Act to extend the time for the construction of the North Wisconsin Railway, and to waive the forfeiture therein referred to.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The forfeiture incurred by the North Wisconsin Railway Company by its failure to construct twenty miles of its road during the year 1876, as required by chapter 126 of the general laws of 1874, entitled "An act to confer certain lands upon the North Wisconsin Railway Company and the Chicago and Northern Pacific Air Line Railway Company, and to execute the trust assumed by the state of Wisconsin by its acceptance of the grants of land made by congress by acts approved June 3d, 1856, and May 5th, 1864," is hereby waived, and the time for the construction of the said twenty miles of said road is hereby extended one year.

SECTION 2. This act shall take effect and be in force from and after its passage and publication.

Approved March 7, 1877.

[No. 215, A.] [Published March 25, 1878.]

CHAPTER 213.

An Act to extend the time for the construction of the North Wisconsin Railway, and to waive the forfeiture therein referred to.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The forfeiture incurred by the North Wisconsin Railway Company [*i. e.*, the Omaha Company], by its failure to construct twenty miles of its road during the year 1877, as required by chapter one hundred and twenty-six of the Laws of Wisconsin for 1874, entitled "An act to confer certain lands upon the North Wisconsin Railway Company and Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the state of Wisconsin by its acceptance of the grants of land made by congress by acts approved June 3, 1856, and May 5, 1864," and the acts amendatory thereof and supplementary thereto, is hereby waived and the time for the construction of the said twenty miles of road is hereby extended one year.

SECTION 2. This act shall take effect and be in force from and after its passage and publication.

Approved February 15, 1878.

[No. 282, A.] [Published March 28, 1878.]

CHAPTER 229.

An Act to extend the time for the construction and completion of the railway of the Chicago, Portage & Superior Railway Company.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The time limited for the construction and completion of the railway of the Chicago & North-

ern Pacific Air Line Railway Company, now the Chicago, Portage & Superior Railway Company, by chapter one hundred and twenty-six of the Laws of Wisconsin for 1874, entitled "An Act to confer certain lands upon the North Wisconsin Railway Company and the Chicago & Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the state of Wisconsin by its acceptance of the grants of land made by congress by acts approved June 3, 1856, and May 5, 1864," is hereby extended three years.

SECTION 2. This act shall take effect and be in force from and after its passage and publication.

Approved, March 16, 1878.

LAWS OF WISCONSIN, 1880.

CHAPTER 176.

An Act to grant to the North Wisconsin Railway Company the optional right to grade forty miles of its railway during the year 1880 in lieu of completing twenty miles thereof during said year; and to define its rights and duties in a contingency therein named.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The North Wisconsin Railway Company may, at its option, grade and make ready for the laying of the track thereon, forty miles of its railway during the year ending on the 4th day of March, A. D. 1881, in lieu of completing during said year twenty miles of said railway as now required by law: *Provided*, that if said option so hereby granted be exercised, the said railway company shall lay the track upon said forty miles of grade during the year ending on the 4th day of March, A. D. 1882, in which event the forty miles so completed shall be deemed equivalent to the completion by said company of twenty miles each year for the years ending on the 4th day of March, A. D. 1881, and on the 4th day of March, A. D. 1882.

SECTION 2. If the North Wisconsin Railway Company shall become owners of a railway constructed in the manner required by the act of Congress granting lands to Wisconsin for railway purposes, approved May 5th, 1864, by another railway company, from Hudson in the County of St. Croix, to River Falls, in the County of Pierce, the railway so acquired between said last-named points shall be taken and deemed to be as fully a part of said North Wisconsin Railway Company's land grant road as if it had originally constructed the same; and when the said, the North Wisconsin Railway Company, shall have added to said railway, between said Hudson and River Falls, at either or both ends thereof, a sufficient number of miles to make, with the road so acquired between said points, twenty consecutive miles, it shall be the duty of the governor to certify to the United States the completion of the said twenty mile section, and the said Railway Company shall be entitled to lands therefor as fully in all respects as if it had itself built the whole thereof. And the ownership of said railway between Hudson and River Falls shall be deemed a full compliance by said company with the provisions of Section 2 of Chapter 126 of the laws of 1874, so far as the said section requires the North Wisconsin Railway Company to construct a railway from Hudson to River Falls.

SECTION 3. This act shall take effect and be in force from and after its passage and publication.

Approved March 11, 1880.

[No. 34, S.] [Approved February 16, 1882.]

CHAPTER 10.

An Act to revoke, annul and resume the grant of lands made by chapter 126 of the Laws of Wisconsin for the year 1874, to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company), and to repeal sections 8, 9 and 10 of said chapter 126, and to confer said grant of lands upon the

Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grant of lands made to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company), by section 8 of chapter 126 of the Laws of Wisconsin for the year 1874, entitled "An act to confer certain lands upon the North Wisconsin Railway Company, and the Chicago & Northern Pacific Air Line Railway Company, and to execute the trust assumed by the state of Wisconsin, by its acceptance of the grants of land made by congress, by acts approved June 3, 1856, and May 5, 1864," is hereby revoked and annulled, and said lands are hereby resumed by the state of Wisconsin.

SECTION 2. There is hereby granted to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, all the right, title and interest which the state of Wisconsin now has, or may hereafter acquire in, and to the lands granted to said state by acts of congress, approved June 3, 1856, and May 5 1864, to aid in the construction of a railroad from the Saint Croix river or lake, to the west end of Lake Superior and Bayfield, which are applicable, under said acts of congress, to the construction of that portion of said railroad from the Saint Croix river or lake, to the west end of Lake Superior, which lies between the point of intersection of said last named railroad, by the Bayfield branch as fixed by the surveys and maps of said railroad, and the branch on file in the general land office in Washington, and the west end of Lake Superior. This grant is upon the express condition that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall continuously proceed with the construction of the railroad now in part constructed by it between said point of intersection and the west end of Lake Superior, and shall complete the same so as to admit of the running of trains thereover on or before the first day of December, A. D., 1882.

SECTION 3. The governor is hereby authorized and directed upon the presentation to him of satisfactory proof of the completion by said Chicago, St. Paul, Minneapolis & Omaha Railway Company of the first

twenty miles of said railroad from said point of intersection toward the west end of Lake Superior, in accordance with said acts of congress and this act, to issue and deliver, or cause to be issued and delivered to said company, patents for all lands applicable under said acts of congress to said twenty miles of completed road, and thereafter, upon the completion by said company of any twenty continuous miles of its said railroad, he shall issue and deliver, or cause to be issued and delivered, patents for all of said lands so applicable to such twenty miles of completed railroad, and upon the completion of said railroad, he shall issue and deliver, or cause to be issued and delivered, patents for the residue of the lands so hereby granted.

SECTION 4. The said Chicago, St. Paul, Minneapolis & Omaha Railway Company, shall, within three days from and after the passage of this act, pay to the governor, for the purposes, and to be disposed of as hereafter, in this act, provided, the sum of seventy-eight thousand dollars; and give such security as the governor shall require to fully indemnify and save, harmless, the state against all liability and expenses incurred in feeding the laborers hereinafter mentioned, should the sum named in section 6, hereof prove inadequate for the purpose, and shall, within thirty days from and after the passage of this act, file with the secretary of state a resolution certified by the president and secretary, under its corporate seal, to have been duly adopted by its board of directors, accepting the grant upon the terms and conditions herein contained; and shall, within said thirty days, give to the State of Wisconsin such security for the completion of said railroad between said point of intersection and said west end of Lake Superior, in accordance with said acts of congress and with this act, as shall be required by the governor, and upon failure of said company to deposit said moneys or to file said resolution, or to give such security within the times hereinbefore limited, this act shall be of no force or effect whatever.

SECTION 5. It shall be the duty of the governor to appoint, immediately, upon the payment to him of the money in the preceding section mentioned, some suitable person, who shall forthwith investigate and ascertain the amounts honestly and actually due, and to whom due, for labor and supplies done and furnished prior to January 20, 1882, in and about the grading and other work done by or

under the auspices of said Chicago, Portage & Superior Railway Company, between said point of intersection and said west end of Lake Superior, and so much of said sum so to be paid to the Governor as aforesaid as shall be necessary therefor, not exceeding, however, in all, seventy-five thousand dollars, shall be disbursed, under the direction of the Governor, and with his approval, upon the report of his said agent, or otherwise, as he may be best advised, in the payment and settlement of said claims. In disbursing said money the *bona fide* claims of laborers shall be first paid, and the amount which shall remain, if any, after the payment of said claims of laborers, shall be applied to the payment of *bona fide* claims of sub-contractors and material and supply men, in full, if sufficient remains therefor; otherwise, shall be divided *pro rata* among them, upon such basis as shall seem to the Governor and his said agent just in the premises. All claims, so to be paid out of said fund hereunder, shall be presented to the Governor within ninety days after the passage of this act, or the same shall be barred from participation in said fund: *Provided*, however, that in no case shall the assignee of any labor claim, hereinbefore mentioned, be entitled to receive out of said fund more than the amount which the Governor and his said agent shall be satisfied was actually paid by said assignee for the claims so assigned and presented by him; and provided, further, that in ascertaining the amounts due to sub-contractors, as aforesaid, no claims for profits, earned or prospective, on any sub-contract shall be considered or allowed; and provided, further, that nothing in this act contained, or the payment of said money to the governor as aforesaid, shall be taken or deemed to be an admission by the said Chicago, St. Paul, Minneapolis & Omaha Railroad Company of any liability whatever for the debts of said Chicago, Portage & Superior Railway Company, or of any person or persons, corporation or corporations. Provided, further, that the said money, so to be paid to the Governor as aforesaid, shall not, while in his hands, be liable to garnishment, attachment or other legal process.

SECTION 6. The Governor shall pay out of the moneys so to be paid to him in excess of said seventy-five thousand dollars, the compensation and expenses of said agent, and shall reimburse the State for all expenses incurred in the premises; and if, after payment

of said claims as herein provided, and after payment of said expenses, there shall remain any surplus, he shall pay the same over to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company.

SECTION 7. Sections 8, 9 and 10 of said chapter 126 of the laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provisions of this act are hereby repealed.

SECTION 8. This act shall take effect and be in force from and after its passage and publication.

Approved February 16, 1882.

[No. 217, S.] Published April 5, 1882.]

CHAPTER 267.

An Act to declare the legal effect of the payments made under chapter 10 of the Laws of 1882, and to constitute the Chicago, St. Paul, Minneapolis & Omaha Railway Company the assignee of certain of the claims paid under said chapter, and to authorize offsets and counter-claims in the cases therein mentioned.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. All payments made to laborers and assignees of laborers out of the fund provided by and to be disbursed under sections 4 and 5 of chapter 10 of the Laws of Wisconsin for the year 1882, entitled "An act to revoke, annul and resume the grant of lands made by chapter 126 of the Laws of Wisconsin for the year 1874 to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago Portage & Superior Railway Company), and to repeal sections 8, 9 and 10 of said chapter 126, and to confer said grant of lands upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company," shall inure to the benefit of the sub-contractors from whom such sums

were due to said laborers, as fully as if the said sums had been paid to said laborers or their assignees by said sub-contractors, and the said sub-contractors shall have the right to sue for and recover the said sums of money so paid to laborers from any person or persons, corporation or corporations, from whom or which they might have recovered the same had they paid said labor claims themselves, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company having paid to the governor under the provisions of said section 4, the sum of seventy-eight thousand dollars, and having given the security to indemnify and save harmless the state against all expenses and liability incurred in feeding said laborers, as contemplated in and provided by said section 4, the said company shall be deemed in all courts and places the assignee and owner of any and all claims and demands which shall be paid out of said fund to sub-contractors and supply and material men, to the full extent that any such claim or demand shall be so paid, and of all right of action on account thereof belonging to said sub-contractors and supply and material men or their assignees, including said labor claims so paid out of said fund, and said Chicago, St. Paul, Minneapolis & Omaha Railway Company may sue for and recover against any person or persons, corporation or corporations, liable in any way or manner for such claims and demands, for the full amount so paid thereon, with interest from the time of such payment, and it may assign and transfer such claims and demands, and its assignee or assignees shall be entitled in like manner to enforce the same by action or by way of set-off or counter-claim, and each and every of said claims and demands so paid, in whole and in part, out of said fund under said act, shall not thereby be extinguished, but shall be held and treated in all courts and places as sold and transferred to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company. The certificate of payment of the agent appointed under said act to investigate the claims and demands therein mentioned of the amount paid to any claimant under said act, or his assignee, approved by the governor, shall be *prima facie* evidence in all courts and places of the amount due such claimant and from whom due, and that such claim or demand has been transferred to, and is owned and held by, the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

SECTION 2. This act shall take effect and be in force from and after its passage and publication.

Approved March 29, 1882.

[No. 306, A.] [Published March 7, 1883.]

CHAPTER 29.

An Act to confirm the revocation, annulment and resumption made by chapter 10 of the Laws of Wisconsin for the year 1882, and to confirm the grant of lands made by said chapter 10.

The people of the state of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The revocation, annulment and resumption made by section 1 of chapter 10, of the Laws of Wisconsin for the year 1882, of the land grant mentioned in said section, are hereby fully in all things confirmed.

SECTION 2. The grant of land made by said chapter 10 of the Laws of 1882, to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, is hereby in all respects fully confirmed.

SECTION 3. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed.

SECTION 4. This act shall take effect and be in force from and after its passage and publication.

Approved March 5, 1883.

APPENDIX No. 2.

Report of Railroad Committee on No. 34 Senate Journal, 1882, pp, 115-118.

The Committee on Railroads, to whom was referred No. 34, S.

A bill to revoke, annul and resume the grant of lands made by Chapter 126 of the laws of Wisconsin, for the year 1874 to the Chicago & Northern Pacific Air Line Railway Company, now the Chicago, Portage & Superior Railway Company, and to confer said grant of lands upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company,

Have had the same under consideration, and report the same back with an amendment, with the recommendation that the same do pass when so amended.

The grant referred to in this bill is a portion of the grant of lands made to the state of Wisconsin by congress, by acts approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from St. Croix River or Lake, between townships 25 and 31, and the West end of Lake Superior and a branch to Bayfield. The duty of the state as to the disposition of this grant seems to your committee quite plain. The act of congress designated specifically the railroad to secure the construction of which the lands were granted, and to guard against any use of them for any other purpose, there was incorporated in said act the following proviso: Provided, further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progressed, and the same shall be applied to no other purpose whatsoever.

By section 3 of said act of June 3, 1856, it was also enacted, "that the lands hereby granted to said state shall be subject to the disposal of the legislature thereof for the purposes aforesaid and no other; and the said railroads shall be and remain public highways for the use of the government of the United States, free from

toll or other charge, for transportation of the property or troops of the United States."

By section 1, chapter 118 of the laws of 1856, it was enacted, "that the lands, rights, powers and privileges granted to and conferred upon the state of Wisconsin by the act of congress granting public lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June 3, 1856, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of congress, and the state of Wisconsin hereby assumes and undertakes the trust created by said act of congress."

The act of May 5, 1864, enlarged the grant from six sections to ten sections in aid of the construction of the same railroad upon the same terms, conditions and restrictions contained in the act of June 3, 1856, and by joint resolution No. 8, adopted by the legislature in 1865, the legislature accepted the grant in the following terms: "That the lands granted to the state of Wisconsin for the purpose of aiding in the construction of certain railroads within this state by virtue of an act of congress granting lands to aid in the construction of certain railroads in the state of Wisconsin, approved May 5, 1864, be and the same are hereby accepted by the state of Wisconsin, subject, however, to all the conditions of said act of congress, and the state of Wisonsin hereby consents to execute the said trusts created by the aforesaid act of congress pursuant in all things to the terms, conditions and limitations of said act."

The legislature recognizes in each of these acts the fact that these lands, donated by the general government for a specific purpose, are accepted by the state as a trustee to be held in trust for the particular purposes indicated by the act of congress, and the Acts of congress and of the legislature accepting the grant, plainly constitute an agreement upon the part of the state to apply these lands to the purpose for which they were granted, and no other purpose whatever.

The few instances in which the state has attempted departing from the terms of the trust upon which these land grants have been held, to secure the construction of roads, to aid in the construction of which the lands were not granted by congress, have not been fruitful in securing the construction of such additional railways, but on the contrary have so loaded down the

grants as to defeat the construction of even the land grant roads.

The grant to aid in the construction of the railroad from St. Croix river or lake to the west end of Lake Superior and to Bayfield, is one of the oldest grants in the United States. It was conferred in 1873 upon the Chicago, Milwaukee & St. Paul Railway Company, loaded with conditions for the construction of roads in addition to the land grant railway proper, and that company declined to accept it.

In 1874, that portion of the grant from the Lake St. Croix to Superior Junction, over one hundred miles in length, and from thence to Bayfield, was conferred upon the North Wisconsin Railway Company, now the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which has nearly completed its road, that portion of the grant applicable to sixty-two (62) miles of the main line of the North Wisconsin Railway from Superior Junction to Superior was, by the same act, conferred upon the Chicago and Northern Pacific Air Line Railway Company (now the Chicago, Portage and Superior Railway Company), upon condition that the said company should complete and put in operation the land grant portion of the road, as soon as a railway should be constructed and put in operation from the City of Hudson to the said Superior Junction, and within five years from its acceptance of said lands; and upon the further condition that it should also construct and put in operation its railroad from Genoa northerly, at the rate of twenty (20) miles a year. The company accepted the grant and agreed to perform the conditions.

The legislature evidently sought to guard against the contingency that the North Wisconsin Railway Company might complete its railway from St. Croix river or lake to the Junction and be obliged to wait there for an indefinite period for the completion of the sixty-two (62) miles necessary to give it an outlet to Superior, it having provided in plain terms that the road from Superior City to the Junction should be completed as soon as the road was completed from the St. Croix river or lake to the Junction and within five years anyway, whether the road was completed from the St. Croix river to the Junction or not.

In 1878 the legislature added three years to the five years, extending the limit of time within which the sixty-two (62) miles must be completed, regardless of

the completion of the road from the river to the Junction, but leaving, in the opinion of your committee, the company plainly bound to complete the railroad from Superior City to the Junction as soon as the road was completed from the St. Croix river or lake to the Junction. Any other construction imputes to the legislature an intention to give the Chicago, Portage and Superior Railway Company three years after the North Wisconsin Railway Company should have completed its road of over one hundred miles to the Junction within which to construct the sixty-two (62) miles and meet it, which your committee cannot believe was the intention.

The road from the St. Croix river or lake to the Junction has been completed for over a year, and the Chicago, Portage and Lake Superior Railway Company have not completed any portion of the road from the west end of Lake Superior to the Junction, nor have they performed the other condition of the grant requiring them to build at the rate of twenty (20) miles a year from Genoa northerly. That company has held the grant since 1874, and notwithstanding the fact that a portion of the time has been peculiarly favorable to raising money for railway construction, has given the state no railway, and the only evidence that it has ever had any vitality is found in a few miles of grade and a thousand or more unpaid laborers.

It is important that the land grant railway should be speedily completed, and your committee are of the opinion that the land grant should be applied, as intended by congress and agreed by the state, for the completion of the land grant railway, and that the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which owns and operates the main line from the St. Croix river or lake to the Junction and is completing the branch from the Junction to Bayfield, should be permitted to complete, by means of the grant, the remaining sixty-two (62) miles of its main line of railway from the Junction to Superior City.

Your committee is advised that the Chicago, St. Paul, Minneapolis and Omaha Railway Company assents to the amendment reported herewith, and will immediately, upon the passage of the bill, deposit with the governor the seventy-eight thousand dollars in money therein referred to.

The passage of the bill will thus without cost to the state immediately meet the exigency to which the

governor has called the attention of the legislature, and afford a full measure of payment to the hundreds of laborers who are awaiting the action of the legislature, and will, moreover, in the opinion of your committee result in the honest, though tardy fulfillment by the state of the trust which she assumed by her acceptance of the grant, twenty-five years ago.

GEO. B. BURROWS,
THOMAS B. SCOTT,
J. F. WILEY,
EDWARD COLMAN,
G. W. RYLAND,
JOS. RANKIN.

UNITED STATES OF AMERICA.

STATE OF WISCONSIN, } ss.:
Department of State. }

To all whom these presents shall come:

I, ERNST G. TIMME, Secretary of State of the State of Wisconsin, do hereby certify that the foregoing copy of the report of the Senate Committee on Railroads, to whom was referred No. 34 S. made February 1, 1882, has been compared by me with the transcribed Senate Journal for 1882, in this Department, and that the same is a true copy thereof, and of the whole of such committee report.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the Capitol in the City of Madison, this 28th day of July, A. D. 1888.

{Seal of the Secretary of State, State of Wisconsin.}

ERNST G. TIMME,
Secretary of State.

REVISED STATUTES OF WISCONSIN, 1878.

SECTION 1753. No corporation shall issue any stock or certificate of stock except in consideration of money, or labor or property, estimated at its true money value actually received by it, equal to the par value thereof; nor any bonds, or other evidences of indebtedness, except for money, labor or property, estimated at its true money value actually received by it, equal to seventy-five per cent. of the par value thereof; and all stock and bonds issued contrary to the provisions of this section, and all stock, dividends and other fictitious increase of the capital stock of any corporation, shall be void. (Laws 1824, ch. 24.)

APPENDIX No. 3.

Copy of Opinions of Mr. Justice Harlan at the Circuit.

(Reported in 39 Fed. Rep., 143.)

CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF WISCONSIN.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Complainant,

vs.

THE CHICAGO, PORTAGE AND SUPERIOR RAILWAY COMPANY, THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, RANSOM R. CABLE, HENRY H. PORTER, and others, Defendants.

In Equity.

Mr. Justice HARLAN delivered the opinion of the Court.

The Farmers' Loan and Trust Company, a New York corporation, brings this suit in its capacity as trustee in a mortgage or deed of trust executed, January 1, 1881, by the Chicago, Portage and Superior Railway Company, a corporation of Illinois and Wisconsin, having power to construct and equip a railroad from the city of Chicago to a point on the north line of the former State, at or near the village of Genoa, Wisconsin, thence by the way of Portage to Superior, at the west end of Lake Superior. The object of the mort-

gage was to secure the payment of the principal and interest of negotiable bonds which the railway company proposed to issue, to the amount of ten million two hundred thousand dollars. And to that end it conveyed to the plaintiff, as trustee, its entire road, together with all lands, land grants, franchises, privileges, powers, rights, estate, title, interest, and property belonging or appertaining thereto, including a certain grant of lands made by the United States to the State of Wisconsin, and by the latter to the mortgagor company. The mortgage authorized the trustee, upon default in the payment of interest, to enter upon the premises, and, also, in certain contingencies, to sell the mortgaged property. It provided, among other things, that the right of action under it shall be vested exclusively in the plaintiff and its successors in trust, and that under no circumstances should individual bondholder institute a suit, action, or other proceedings, on or under the mortgage, for the purpose of enforcing any remedy therein provided.

The bill shows that bonds to the amount of five million dollars were executed, and a part of them issued and sold; and that, in respect to the latter, the mortgagor company (which will be called the Portage Company) was in default as to interest. It is alleged that the defendant, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, (which will be called the Omaha Company,) wrongfully claims to be the owner of the lands granted by the State to the Portage Company, such claim being founded upon enactments of the legislature of Wisconsin which, the plaintiff avers, are unconstitutional, null and void. It is also alleged that even if said enactments vested the legal title in the Omaha Company, the latter, for reasons to be hereafter stated, ought not to be permitted by a court of equity to hold the lands or their proceeds against the plaintiff and the creditors of the Portage Company. A decree is asked declaring this mortgage or deed of trust to be a first lien on the lands, including such as had been or might be certified to the State by the United States as indemnity lands under the above grant.

In connection with the general outline of the present suit, it is necessary to state the history of these lands as disclosed by the legislation of Congress and of this State.

By an act of Congress, approved June 3, 1856, there was granted to Wisconsin, for the

purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield ; and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land, designated by odd numbers, for *six* sections in width, within fifteen miles, on each side of said road respectively; the lands to be held by the State, subject to the disposal of the legislature, for no other purpose than the construction of the road for which they were granted or selected, and disposed of only as the work progressed.

The fourth section provided that the lands be disposed of by the State only in manner following, that is to say : that a quantity not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road respectively, might be sold ; and when the governor certified to the Secretary of the Interior that any twenty continuous miles of either road were completed, then another like quantity of the land granted might be sold ; and so, from time to time, until the roads were completed ; and if they " are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States." 11 *Stat.* 20.

By an act of the Wisconsin legislature, approved October 8, 1856, the lands, rights, powers, and privileges granted by Congress, were accepted upon the terms, conditions, and reservations contained in the act of June 3, 1856, and the State assumed the execution of the trust thereby created. *Laws Wis.* 1856, *p.* 137.

On the second of March, 1858, the State filed in the General Land Office of the United States a map fixing the definite location of the railway under the act of Congress of June 3, 1856.

By an act approved May 5, 1864, Congress enlarged the grant of lands in aid of the construction of a road running northerly from the St. Croix River or Lake. The first section of that act granted to Wisconsin for the purpose of aiding in the construction of a railroad from a point on that river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of the railroad, to be selected by the State, to Bayfield, every alternate section of public land designated by odd numbers, for *ten* sections in width, within twenty miles on

each side of said road, deducting lands granted for the same purpose by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in that act; the State to have the right of selecting other lands, nearest to the tier of sections above specified, in lieu of such of those granted as should appear, when the line or route of the road was definitely fixed, to have been sold or otherwise appropriated, or to which the right of pre-emption or homestead had attached; which lands "shall be held by said State for the use of and purpose aforesaid."

The time limited for the completion of the roads specified in the act of June 3, 1856, were extended to a period of five years from and after the passage of the act of 1864. § 5.

The seventh section in these words: "That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said railroad is completed: *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States."

The eighth section provided that the lands granted should, when patented as provided in section seven, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other, and that the railroads be, and remain, public highways for the use of the government of the United

States, free from charge for the transportation of its property or troops. 13 *Stat.* 66.

By a joint resolution of its legislature, approved March 20, 1865, the State accepted the grant made by the act of May 5, 1864, subject to the conditions prescribed by Congress (*Gen. Laws Wis.* 1865, *p.* 689,) and on the 6th day of May, 1865, filed in the General Land Office of the United States a certificate adopting the location on the map previously filed as the definite location under the last act. That map and location were accepted and approved by the Secretary of the Interior.

A subsequent act of the legislature, approved March 4, 1874, and published March 11, 1874, *c.* 126, (*Laws Wis.* 1874, *p.* 186,) granted to the North Wisconsin Railway Company, for the purpose of enabling it to complete the railroad, then partially constructed by it, all the right, title and interest the State then had or might thereafter acquire in and to the lands granted by the acts of Congress to aid in the construction of a railroad from the St. Croix River or Lake, between townships twenty-five and thirty-one, to the west end of Lake Superior and Bayfield, "except those herein granted to the Chicago and Northern Pacific Air-Line Railway Company."

The eighth, ninth, twelfth and fifteenth sections of that act are as follows:

"§ 8. There is hereby granted to the Chicago and Northern Pacific Air-Line Railway Company [*i. e.*, the said Portage Company] all the right, title, and interest which the State of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said State by said two acts of Congress [of 1856 and 1864] as is or can be made applicable to the construction of that part of the railway of said company *lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior.* This grant is made upon the express condition that said [Portage] company shall construct, complete and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and *within five years from its acceptance of said lands as herein provided*, and shall also construct and put in operation the railway of said

company from Genoa northerly, at the rate of twenty miles per year.

"§ 9. The governor is hereby authorized and directed, upon the presentation to him of satisfactory proof, that twenty continuous miles of that part of the railway of said company first above mentioned have been completed in accordance with said acts of Congress and this act, to issue and deliver, or cause to be issued and delivered to said [Portage] company patents in due form from said State for two hundred sections of said land, and thereafter upon the completion of twenty continuous miles of said railway, he shall issue or cause to be issued and delivered to said company, patents for two hundred sections of said lands, and on the completion of that part of the railway of said company lying between the point of intersection and the west end of Lake Superior, he shall issue and deliver or cause to be issued and delivered to said company, patents for the residue of said lands hereby granted to said company.

"§ 12. The said Chicago and Northern Pacific Air-Line Railway Company [*i. e.*, the Portage Company] shall, within sixty days from and after the passage of this act, file with the secretary of state a resolution duly adopted by the board of directors, accepting this grant upon the terms and conditions herein contained, and shall also, within said sixty days, give to the State of Wisconsin such security for the completion of that portion of its railway lying between said point of intersection and the west end of Lake Superior, in accordance with the provisions of said acts of Congress and this act, as shall be required by the governor: *Provided, however*, That said security shall be of no force or effect until Congress shall have passed an act renewing said grants or extending the time for the construction of said road, or until it shall have been decided by the Supreme Court of the United States that the present title of the State is absolute and indefeasible; and upon the failure of said company to file said resolution and to give the said security within the time hereinbefore limited, this act shall be of no effect so far as it grants to the said company any interest in or right to said lands.

"§ 15. This act shall take effect and be in force from and after its passage and publication."

The bond required by the twelfth section of the above act was approved by the governor and filed May 9, 1874.

Prior to March 16, 1878, the Chicago and Northern Pacific Air-Line Railway Company changed its name to that of the Chicago, Portage and Superior Railway Company [herein called, for short, the Portage Company].

By an act of the Wisconsin Legislature, approved on the day last named, and published March 28, 1878, "the time limited by the act of March 4, 1874, for the construction and completion of the railway" of the Chicago, Portage and Superior Railway Company, was extended *three* years. *Laws Wis.* 1878, p. 442.

By the first section of an act of the legislature, approved February 16, 1882, *c.* 10 (*Laws Wis.* 1882, p. 11), it was declared that the grant of lands made to the Chicago, Portage and Superior Railway Company, by the act of March 4, 1874, "is hereby revoked and annulled, and said lands are hereby resumed by the State of Wisconsin."

The second section is in these words: "There is hereby granted to the Chicago, St. Paul, Minneapolis and Omaha Railway Company [herein called for short the Omaha Company] all the right, title and interest which the State of Wisconsin now has, or may hereafter acquire in or to the lands granted to said State by acts of Congress, approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St. Croix River or Lake to the west end of Lake Superior and Bayfield, which are applicable under said acts of Congress to the construction of that portion of said railroad, from the Saint Croix River or Lake to the west end of Lake Superior, which lies *between the point of intersection of said last-named railroad, by the Bayfield branch, as fixed by the surveys and maps of said railroad, and the branch on file in the General Land Office at Washington, and the west end of Lake Superior.* This grant is upon the express condition that the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall continuously proceed with the construction of the railroad *now in part constructed by it* between said point of intersection and the west end of Lake Superior, and shall complete the same so as to admit of the running of trains thereover on or before the 1st day of December, A. D. 1882."

The seventh section provides that "Sections 8, 9 and 10 of said chapter 126 of the Laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provisions of this act, are hereby repealed."

By an act of the Wisconsin legislature, approved and published March 7, 1883, it was declared:

"§ 1. The revocation, annulment, and resumption made by section 1 of chapter 10 of the Laws of Wisconsin for the year 1882, of the land grant mentioned in said section, are hereby fully in all things confirmed.

"§ 2. The grant of land made by said chapter 10 of the Laws of 1882, to the Chicago, St. Paul, Minneapolis and Omaha Railway Company [the Omaha Company], is hereby in all respects fully confirmed.

"§ 3. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed.

"§ 4. This act shall take effect and be in force from and after its passage and publication.

It will be seen from the above statement that the grant in the eighth section of the act of the Wisconsin legislature of March 4, 1874, embraced so much of the lands granted by the act of Congress of June 3, 1856, and May 5, 1864, as were applicable to the construction of the part of the road of the Portage Company "lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior"—a distance of about sixty-five miles. That is the road to which this suit relates.

According to the most liberal construction of the act of March 4, 1874, and that of March 16, 1878, the time limited for the completion of that road expired, at least, in May, 1882, eight years after the railway company filed its bond, as required by the ninth section of the act of 1874. It is conceded that the Portage Company never completed its land-grant division. Nor did it ever construct any part of the road from Genoa northerly, as required by the act of 1874.

The bill alleges that the Portage Company broke down in the monetary panic of 1873–4, under a large load of debts and embarrassments, and lay dormant until late in the year 1880, when its stockholders em-

ployed one Gaylord to find parties able and disposed to revive it and put it on the way of success; that the work of its rehabilitation had so far progressed that in the fall of 1881, and early in 1882, the company borrowed large sums of money and expended them in pushing the construction of the land-grant division in which it was interested; that, on the 19th of January, 1882, more than one-half of the substructure of that division had been completed; that at the time last named more than sixteen hundred men were at work upon it, and its construction, in ample time to lay the rails and complete the division before May 5, 1882, was assured.

It is further alleged that the Portage Company would have completed its land-grant road but for the following cause: 1. The passage by the State legislature of the act of February 16, 1882, revoking and annulling the grant contained in the act of March 4, 1874, which destroyed the credit of the company while it was actively engaged, under many disadvantages, in the construction of its road. 2. That the Omaha Company, its agents and emissaries, interfered with and defeated the efforts of the Portage Company to complete its road within the required time.

Although the act of June 3, 1856, provided that if the roads therein named were not completed within ten years no further sales should be made, and the lands unsold should revert to the United States; and although the only extension of the period for such completion ever made by Congress was for five years from and after the passage of the act of May 5, 1864, no question is made in the present suit as to the title of these lands being in the State at the date of the passage of the act of March 4, 1874, for all the purposes indicated in the acts of Congress. This, perhaps, is because of the decision in *Schulenberg* v. *Harriman*, 21 *Wall.* 44, in which the court had occasion to interpret the acts of June 3, 1856, and May 5, 1864; holding the requirement that the lands remaining unsold after a specified time shall revert to the United States, if the road be not then completed, to be nothing more than a provision that the grant shall be void if a condition subsequent be not performed; that when a grant upon condition subsequent proceeds from the government, no individual can assail the title upon the ground that the grantee has failed to perform such condition; and the United States having taken no action to enforce the

forfeiture of the estate granted, "the title remained in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision, and became attached to the adjoining alternate sections." See, also, *McMicken* v. *United States*, 97 *U. S.* 204, 217; *Grinnell* v. *Railroad Company*, 103 *U. S.* 739, 744; *Van Wyck* v. *Knevals*, 106 *U. S.* 360, 368; *St. Louis, &c., Railroad Company* v. *McGee*, 115 *U. S.* 469, 473. These authorities also indicate the mode in which the right to take advantage of the non-performance of a condition subsequent, annexed to a public grant, may be exercised, namely, "by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, or adjudging the restoration of the estate on that ground," or by "legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement."

The questions to which the attention of the court has been principally directed relate, more or less, to the act of February 16, 1882, revoking and annulling the grant to the Portage Company. The main contention of that company is that the grant of 1874, the acceptance thereof, and the bond given for the performance of the condition as to the construction of the land-grant division, constituted a contract, entitling it to earn the lands by completing the sixty-five miles of railway, to the west end of Lake Superior, by May 5, 1882, without opposition or hindrance on the part of the State; consequently, it is argued, the forfeiture declared by the act 1882 impaired the obligation of that contract, and was unconstitutional and void.

On the part of the Omaha Company it is contended that one of the *conditions* of the grant to the Portage Company was that it would construct and put in operation its road from Genoa northerly at the rate of twenty miles each year; that no part of *that* road had been constructed when the act of 1882 was passed; and that, by reason of such default, the State had the right to withdraw the grant from the latter company, without regard to what had or had not been done towards the construction of its land-grant division. To this the plaintiff replies that the obligation which the Portage Company assumed with reference to its road from Genoa northerly was not made, nor intended to be made, *a condition*

of its right to earn the lands applicable to that part of the road between the point of intersection of the Bayfield branch with the branch extending to the west end of Lake Superior; and that, consistently with the acts of Congress, the State could not make the right to earn these lands depend upon the construction of any part of its line, except that which Congress intended to aid by the grant.

It is also contended by the Omaha Company that the grant to the Portage Company was beyond the power of the State to make; that the mode in which the State disposed of the lands to the latter company was inconsistent with that prescribed in the act of Congress, that is, that the State had no authority, in advance of the *completion* of the road, to dispose of the land, by sale, conveyance or otherwise, beyond one hundred and twenty sections, or to make any additional contract in respect to their disposition. To this the plaintiff replies that the act of 1864, by necessary implication, permitted the State to dispose of the lands, subject to the conditions of the grant, as to the time when the absolute title should pass from the State to the corporation earning them, and as to the time within which the road should be completed. Such, it is claimed, was all that was done by the act of 1874.

As will be seen from the views hereafter expressed touching other questions, it is not necessary to decide whether the eighth section of the act of 1874 made the construction by the Portage Company of its road from Genoa northerly a *condition* of the grant to it of these lands, or whether such a condition could have been legally imposed by the State. The Court is inclined to the opinion that if the Portage Company had duly performed the condition prescribed as to the completion of its land-grant division, its right to the lands applicable to that division, and expressly set apart to aid in its construction, would not have been affected by its failure to construct the Genoa branch. But the decision will not be placed upon that interpretation of the legislation in question.

Nor will it be necessary to determine the other questions above stated, nor the question as to the validity of the revocation contained in the act of February 16, 1882. For if it be assumed that such revocation was a nullity, as impairing the obligation of the alleged contract between the Portage Company and the State, especially because made before the expiration of the

period limited for the completion of its road, and while the company was engaged in constructing it; if the mode in which the State disposed of the lands to the Portage Company be conceded to have been consistent with the acts of Congress; and if the authority of that company to mortgage the lands in order to raise money for the construction of the road be admitted; still, there remain, in the way of granting the relief sought, these stubborn, indisputable facts:

First, That no corporation could acquire, and, therefore, could not pass, an interest in the lands, except subject to the condition prescribed in the act of the State legislature as to the time within which the land-grant division should be completed, and, therefore, subject to the right of the State, in some appropriate mode, to resume its ownership and possession of the lands for any substantial failure to perform that condition;

Second, That the road was not constructed or completed within the time prescribed by the acts of March, 4, 1874, and March 16, 1878;

Third. That, after the expiration of that period, the revocation, annulment and resumption declared by the act of February 16, 1882, and the grant in the same act to the Omaha Company, were in all things confirmed by the act of March 5, 1883, which, besides, repealed the latter statute and all previous acts interfering with or in any manner conflicting with such act of confirmation.

If the act of February 16, 1882, was a valid exercise of power by the legislature, that, plainly, is an end of this branch of the case. But if it was unconstitutional and void, upon any ground whatever, its passage did not, in a legal sense, deprive the Portage Company of the right to proceed with the work of construction, and, by completing the road within the required time, become entitled to receive patents, or to compel any corporation or persons to whom patents were wrongfully issued to surrender the title. The validity and effect of the confirmatory act of March 5, 1883, does not depend upon the validity of the act of February 16, 1882; for if the latter act was void, it was clearly within the power of the legislature, by the act of 1883,—neither the road, nor any twenty continuous miles thereof, having at its date been completed by the Portage Company,—to withdraw or annul the grant to that company, and to make a new grant of the lands to another corporation. The revocation by the act of March 5, 1883,

of the grant to the Portage Company, accompanied by a confirmation, in the same act, of the grant of the same lands to the Omaha Company, were equivalent to a revocation, made, for the first time, on that day, and to an affirmative grant, then, for the first time, to that company. The passage by the legislature, in 1882, of an act that was void did not prevent it from passing a valid act, in 1883, touching the same subject. In *Strother* v. *Lucas* 12 *Pet.* 454, it was said: "That a grant may be made by a law, as well as a patent pursuant to law, is undoubted (6 *Cranch*, 128); and a confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*." See also *Field* v. *Seabury*, 19 *How.*, 323, 334; *Langdean* v. *Hanes*, 521, 530; *Slidell* v. *Grandjean*, 111 *U. S.*, 412, 439; *Whitney* v. *Morrow*, 112 *U. S.*, 693, 695.

It results from what has been said that, unless restrained by some legal obligation or contract from revoking the grant to the Portage Company, after the expiration of the time limited for the completion of the road to the west end of Lake Superior, the power of the State to pass the act of March 5, 1883, cannot be questioned. Were the hands of the State tied by any such obligation or contract? It has already been said that the mere revocation of February 16, 1882, if invalid, did not put the State under any legal obligation to forbear the exercise of any power it had after, and by reason of, the failure of that company to complete its land-grant road within the time stipulated.

Assuming that the completion of the road, within the time limited, was rendered impossible by the act annulling the grant made to the Portage Company, it is contended that the case comes within the familiar rule that "where a condition subsequent be possible when made, and becomes impossible by act of God or the king's enemy, or the law, or *the grantor*, the estate, having once vested, is not thereby divested by the failure, but becomes absolute," citing *Coke's Littleton*, 206*a*, 206*b*; 4 *Kent*, 130; *Davis* v. *Gray*, 16 *Wall.*, 230–1. This rule cannot be applied to the present case. It is not to be disputed that the revocation of the grant to the Portage Company had an injurious effect upon its credit. But, in a legal sense, such revocation by an unconstitutional, void act of legislation—which the plaintiff affirms the act of February 16, 1882, to be—cannot be said to have made impossible the per-

formance of the condition upon which the company's title to the lands depended. The attempted revocation by the legislature, in 1882, and the loss by the company of credit in financial circles, do not, in law, hold the relation of cause and effect. The contrary view is not sustained by *Davis* v. *Gray*, 16 *Wall.*, 203, 230. While the court there recognized the rule excusing the performance of a condition subsequent where performance was rendered impossible by the act of the law, or of the grantor, it was alleged in the bill, and admitted by the demurrer, that the State, by plunging her people into civil war, had herself prevented the railroad company from earning the grant of lands made in aid of the construction of its road. A condition of war, it was conceded, wholly precluded the completion of the road. But, even in that case, performance within a reasonable time was held to be essential to any claim to have the benefit of the grant. Here, there has not been performance by the Portage Company in respect to any part of its land-grant division. If the act of 1882 was void, and if, despite its passage, the Portage Company had completed the road within the required time, it would not be disputed by the plaintiff that, as between the company and the State or any other grantee of the State, the equitable title to lands would have been in that company. Its misfortune—assuming the representations as to its general financial conditions to be true—was, that it had no credit of consequence except such as it got from the State's grant of lands; a circumstance that cannot control the determination of the question whether the act of 1882, in a legal sense, rendered it impossible to complete the road in time. If this be not so, it would follow that the act of 1882 would excuse or not excuse the failure of the Portage Company to complete the road within time, as the evidence was the one way or the other touching its financial ability to have done so, apart from the credit given by the grant of the lands in dispute. But the rule invoked by the plaintiff surely does not rest upon such a shifting foundation. Within that rule, the impossibility to perform a condition subsequent is one arising from some obstacle interposed by the grantor, actually precluding or preventing performance by the grantee, or an impossibility that ensues, as matter of law, from something that the grantor did or caused to be done. There is no claim of actual interruption by the officers or agents of the State of the construction of the road;

and, assuming the act of 1882 to have been unconstitutional, it cannot be true, in any legal sense, that nonperformance of the condition, as to the completion of the road within the prescribed time, resulted from the mere passage of that act.

It remains to consider other aspects of the case that have been presented with marked ability by the counsel for the plaintiff.

It is contended, in substance, that the forfeiture of the land grant was caused by false representations made to the legislature by the Omaha Company, which desired the transfer of the grant to itself to aid in the construction of its own road, and that the company by fictitious suits, and by corruptly conspiring with officers of the Portage Company, wrongfully and fraudulently prevented the latter company from performing the condition in respect to the time within which the road was to be completed; consequently, the lands and their proceeds should be subjected by a court of equity to the debts of the Portage Company, secured by its land mortgage. The principal allegation of the bill as to what the Omaha Company did is: "Furthermore, it, and at its instance, others employed by it, and especially the said A. A. Jackson and C. J. Barnes, who were well known as officers of the Portage Company, and understood to be authorized to speak in its behalf, falsely represented to members of said Legislature that the Portage Company had made no substantial progress towards the construction of said land-grant division, and never had any considerable number of men at work thereon, and was wholly without means or credit to prosecute said work; that it had at last voluntarily and finally abandoned all attempt to construct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon, the Legislature of Wisconsin, relying upon these false representations, and without inquiry or hearing, hurriedly passed the act of February 16, 1882, above named, to forfeit the said land grant of the Portage Company and confer it on Omaha Company."

Undoubtedly the Omaha Company was both willing and anxious that this land grant should be wrested from the Portage Company and transferred to itself; and to effect that end it appeared by its agents before legislative committees for the purpose of showing that the Portage Company did not have the means or credit

necessary to construct, and never would construct, the road in question within the time fixed. And it may be assumed, for the purposes of this case, that the agents of the Omaha Company made representations as to the condition of the other company that were not in all respects consistent with the truth or with fair dealing. Still, the question arises, how is a judicial tribunal to ascertain the extent to which the action of the legislative department in revoking this grant was controlled or influenced by representations made to its members by the Omaha Company about the other company? Can the courts, in any case, assume that the legislature was not fully informed when it passed a statute relating to public objects, as to every fact essential to an intelligent determination of the matters to which that statute relates? Must it not be conclusively presumed that in disposing of lands held in trust for public purposes it was controlled entirely by considerations of the public good, and not, in any degree, by false representations of individuals having private ends to subserve, and having no special concern either for the general welfare or for the rights of other individuals?

These questions are all answered in numerous adjudged cases, the leading one of which is *Fletcher vs. Peck*, 6 *Cranch*, 87, 129, 130. That was an action for breach of certain covenants in a deed made by Peck for lands embraced in a purchase by Gunn and others from the State of Georgia, under an act passed by the legislature of that State. One of the covenants alleged to have been broken was that all the title the State ever had in the premises had been legally conveyed to Peck, the grantor. It was assigned, in substance, as a breach of that covenant that the act there in question was a nullity, and so the title of the State did not pass to Peck, because it was procured by corruption and undue influence used by the original grantees from the State upon members of the legislature. Chief Justice Marshall, speaking for the court, said:

"That corruption should find its way into the government of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any way be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul the rights acquired

under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of the State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still it would be difficult to say to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate upon a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted whether it is in the power of the judiciary to control their conduct; and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not discerned. . . . If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

It is true that there is no suggestion in the present case that the act of revocation of February 16, 1882, was procured by bribery or corruption practiced upon members of the Wisconsin legislature. But the charge is that that body was induced by false representations, made by the agents of the Omaha Company, to do what they would not otherwise have done. This difference in the facts does not make the principles announced in *Fletcher* v. *Peck* inapplicable to the present case; for, if an act of legislation cannot be impeached by proof of corruption upon the part of those who passed it, much less can it be made a matter of proof that legislators were deceived or misled by false representations as to facts involved in proposed legislation of a public char-

acter. The principle upon which *Fletcher* v. *Peck* rests excludes all extrinsic evidence of witnesses as to the motives of legislators, or as to the grounds of legislative action. In *Ex parte McArdle*, 7 *Wall.*, 514, the court said: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution." In *Doyle* v. *Continental Insurance Company*, 94 *U. S.*, 541: "If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law." So, in *Soon Hing* v. *Crowley*, 113 *U. S.*, 703, 704, 710. "The rule in general in reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislature in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motive of the legislators, considered as the purpose they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment. But their motives, considered as the moral inducements for their votes, ever vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the minds of men and ascertaining the truth, preclude all such inquires as impracticable and futile." It was well said by the Supreme Court of Michigan, in *Plank Road Company* v. *Woodhull*, 25 *Mich.* 103: "The legislature will not only choose its own mode of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government, we must assume that these motives were the suitable and proper ones, and that they led to correct results; and if the results show no investigation, we must still presume that the proper information was obtained, for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority."

To the same general effect are many other cases. *Aldridge* v. *Williams*, 3 *How.* 24; *Maynard* v. *Hill*, 125 *U. S.* 190, 209; *Johnson* v. *Higgins*, 3 *Met. (Ky.)* 566, 576; *Sanbury & Erie Railway Co.* v. *Cooper*, 33 *Penn. St.* 278, 283; *Stark* v. *McCowan*, 1 *Nott & Mc-*

Gowen, 387, 400; 46 *N. Y.* 405; *Wright* v. *Defrees*, 8 *Ind.* 298, 302; *Jones* v. *Jones*, 12 *Penn. St.* 350, 357.

For the reasons stated, evidence as to the falsity or truth of representations made by the Omaha Company, or its agents, to the legislature, or to legislative committees, in respect either of this land grant or of the Portage Company, as well as evidence as to any efforts by the Omaha Company to bring about the revocation of the grant made to the other company, is immaterial to the present controversy. Such evidence cannot be made the basis of judicial determination without entrenching upon the independence of a co-ordinate department of the government, and impairing its right to proceed, in the exercise of its functions, upon such information as it deems necessary. An adjudication as to rights acquired by individuals under public enactments, based upon an inquiry as to whether those individuals made false representations to the legislature, or as to whether the legislature was probably influenced by such representations, is an indirect interference with the power of the legislature, acting within the limits of its authority, to enact such laws as it deems best for the general good. The courts must, of necessity, presume —whatever may be averred to the contrary—that no general statute is ever passed either for want of information upon the part of the legislature or because it was mislead by the false representation of lobbyists or interested parties. They must restrict their inquiries to the validity of such legislation. Such is the established doctrine as to legislative enactments relating to public objects, although a different rule is recognized by some courts in respect to private statutes alleged to have been procured by fraud practised upon the legislature by those claiming benefits under them.

What has been said disposes of the suggestion that the dispersion of the force employed by the Portage Company in the early part of the year 1882 in the construction of its road, the suspension of the work of construction, and its inability to raise the necessary funds for the completion of the road within the time stipulated, was the result of the machinations of agents of the Omaha Company, acting by its authority, and of the corrupt conspiring by those agents with officers of the Portage Company, whereby those officers neglected to do towards the timely completion of the road what, in fidelity to their employers, they might have done. Whether this arraignment of the Omaha Company is

justified by the evidence, or whether the Portage Company could, in its weak financial condition in 1882, have completed the road within the required time, if its plans had not been interferred with, in the manner stated, it is not necessary to determine. For, as already indicated, if all that is said in respect to the conduct of the Omaha Company were clearly established, the settled principle of law forbid the court from assuming that the legislative department of the State when it passed the act of 1882 as well as the confirmatory act of 1883 was not in possession of every fact affecting the justice of such legislation. These principles cannot be disregarded in order to remedy the hardships of particular cases. If each member of the legislature was aware when that act was passed of everything which it is alleged was done by the Omaha Company in regard to this land grant and its rival company, and yet in discharge of what it deemed a public duty, and in order to secure the speedy completion of a public highway, supposed to be imperatively required by the interests of their constituents, passed the confirmatory act of 1883, and thereby selected the beneficiary of the grant made by Congress in aid of the construction of that highway, the conduct of the Omaha Company surely would not constitute any ground why a court of equity should attempt to thwart the wishes of the legislative department. That is precisely what would be done if the court took from that company the benefit of the grant deliberately made to it by the legislature in aid of the construction of its road. Legislative enactments, relating to public objects, so far as they confer rights upon individuals, must stand, if they be constitutional, without any attempt upon the part of the courts to conjecture or ascertain what the members of the legislature would or would not have done under any given state of facts established by extrinsic evidence.

It is further said, in behalf of the plaintiff, that the Omaha Company became, as early as January and February, 1882, the owner of every share of the capital stock of the Portage Company, and of a large part of its bonded and floating indebtedness; that the former company built a road from Mud Lake to Superior City, parallel to and a few yards from the half-graded line of the latter company; and that the road so built was such an one as was described in the acts of Congress of

1856 and 1864. Upon these facts the plaintiffs rest the contention, that as that road was constructed by a corporation which was the sole stockholder and a principal creditor of the Portage Company, and as the law avoids forfeitures where practicable, the condition imposed by the State may be regarded as having been duly performed, within the rule that "any one who is interested in a condition may perform it, and when performed, it is gone forever;" citing 2 *Crabbe's Real Prop.* 815; 2 *Washb. Real Prop. (2d ed.) p.* 12, and other authorities.

The court is unable to assent to this view, for the reason, if there were no other, that what was done by the Omaha Company towards the construction of its road to Superior City was not done by it as a stockholder and creditor of the Portage Company. It did not elect or intend, in that capacity, to perform the condition imposed by the State upon the latter company. The record conclusively establishes the fact that in constructing the road to the west end of Lake Superior the Omaha Company proceeded under its own charter, and represented its own stockholders, and not the stockholders of the other company. It built its own branch road, and did not complete the road commenced by the Portage Company. It was so understood by the plaintiff; for it alleges in the bill that "in the year 1882 the Omaha Company constructed its branch to Superior City, alongside of the partially constructed line of the Portage Company, and has ever since operated the same." And this is consistent with the second section of the act of February 16, 1882, which made the grant to the Omaha Company upon the express condition that it would continuously proceed with the construction of the road then "in part constructed *by it* between said point of intersection and the west end of Lake Superior," and complete it on or before December 1, 1882. It is impossible to suppose that the Omaha Company ever intended to perform the condition imposed upon the Portage Company in reference to the latter's road, It performed the condition imposed in the act granting these lands in aid of the construction of *its* road. The plaintiff's whole case proceeds upon the theory that the Omaha Company sought to prevent any result that would be beneficial to the other company. It would, therefore, be a perversion of the rule, upon which the plaintiff relies, and inconsistent with the entire evidence, to say that the

Omaha Company was interested in performing, or intended to perform, or that the State regarded it as performing, the condition in question for or in behalf of the Portage Company. That would make the Omaha Company do something for another corporation which it did not elect to do, and was not bound in law to do.

Many other questions have been discussed by the counsel of the respective parties, about which the court forbears any expression of opinion. Their determination is rendered unnecessary by the conclusions reached upon the principal points.

The bill must be dismissed for want of equity, and with costs to the defendants.

It is so ordered.

CIRCUIT COURT OF THE UNITED STATES.

WESTERN DISTRICT OF WISCONSIN.

SARAH R. ANGLE, Administratrix of Horatio G. Angle, deceased, vs. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, &c.	In Equity.

Mr. Justice HARLAN delivered the opinion of the Court.

The plaintiff recovered in this Court January 31, 1887, a judgment against the Chicago, Portage and Superior Railway Company for the sum of $205,883.19, damages and costs. Execution having been issued and returned unsatisfied, this suit was instituted for the purpose of reaching and subjecting to the satisfaction of that judgment the same lands as are in controversy in the suit in this court just determined, of the *Farmers' Loan and Trust Company, Trustee*, v. *Chicago, St. Paul, Minneapolis and Omaha Railway Company, &c.*, and all notes, bonds or moneys arising from sales, rents, stumpages, license charges or proceeds of sale of such lands, in the hands either of the corporation last above named, or of the judgment debtor. The allegations of the present bill are substantially the same as in the bill filed in the other suit. For the reasons stated in the opinion delivered in the suit brought by the Farmers' Loan and Trust Company, the court holds that the Chicago, Portage and Superior Railway Company has no interest in said lands which can be subjected in satisfaction of the above judgment against it.

The demurrer is sustained, and the bill must be dismissed with costs to the defendants.

It is so ordered.

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SARAH R. ANGLE,
vs.
OMAHA R. R. Co.
No. 73.

Supplemental Brief for Appellant.

The last proposition discussed in the brief for the appellee, to wit: that the appellant has a complete remedy at law, was not made in the case below, and time does not permit us now to make a full reply thereto.

That this point should have been raised at all in so clear a case for equitable relief, shows that defendants are clutching at straws. They well know that, if the complainant has misconceived her remedy, the statute of limitations will bar another action, and her eleven years of struggle for justice will come to grief.

But there is no foundation for the defendants' proposition.

The appellant has not "a plain, adequate" remedy at law. To defeat equitable jurisdiction it is not enough to show that there is *a* legal remedy. As was said by Mr. Chief Justice Fuller in the recent case of Kilbourne vs. Sunderland (130 U. S. 505), "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy

which equity would confer under the same circumstances."

First. The bill alleges that the land grant is made up of heavily timbered pine lands, and the Omaha Company has executed many conveyances to innocent purchasers of large portions of said lands, and many leases and permits to cut timber thereon and remove the same, and that it continues to so dispose of and authorize waste upon said lands; and that a great deal of the timber is being cut down and removed, and that the chief value of the lands consists in the timber thereon; Wherefore it asks for an injunction; the appointment of a receiver, and accountings. (Bill, sections, 1–7, pp. 18, 19.)

If an injunction is asked for and appears a necessary remedy, the court will retain jurisdiction in order to grant full relief. (Bispham, section 37, and cases cited in notes.)

It is evident from the facts stated in the bill that the prayer for an injunction, a receiver, and an accounting, is made in good faith, and is not a pretext for bringing a suit in equity.

Second. Appellee insists that an equitable proceeding to subject the land grant to the payment of appellant's judgment does not appear to be necessary, for it is to be presumed that if a judgment were obtained against the Omaha Company it could be satisfied on execution out of its other property. We know of no such presumption of solvency of railway companies. If any presumption arises, from the general experience of mankind, it would be

that a large judgment could not be satisfied against any average railway company. We suppose that four railroads out of five in the United States would not sell under the hammer for as much as they are encumbered for.

Third. The remedy by creditors' bill against the Omaha Company, is more adequate than would have been a suit at law, for the further reason that it gives appellant a lien on the land grant, if her bill be sustained, from 1887 when it was filed, whereas, if she had sued the Omaha Company at law, and after judgment had found these lands all sold to innocent purchasers, she would have had no relief against them.

THOMAS EWING,
MILTON I. SOUTHARD,
Of Counsel for Appellant.

Nov. 7th, 1893.